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Car Case  
Feb. 14/74



No. 57519

GLADYS WHITE,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY
	)	
vs.	)	
	)	
CHECKER TAXI COMPANY, INC.,	)	HONORABLE
	)	ROBERT H. CHASE,
Defendant-Appellee.	)	PRESIDING.

Mr. JUSTICE McGLOON delivered the opinion of the court:

This is an appeal of a personal injury action brought by the plaintiff against the defendant-carrier to recover for injuries sustained when the plaintiff, while a passenger, allegedly fell out of one of defendant's taxis. After a trial without jury the trial judge found for defendant and the plaintiff has appealed that determination. The only issue on appeal is whether the trial court's judgment was against the manifest weight of the evidence.

We affirm.

Pursuant to Supreme Court Rule 23 (Ill.Rev.Stat. 1971, ch.110A, par.23) we will briefly set out such matters that, in the judgment of this court, are necessary for an understanding of the case.

At trial the plaintiff testified that on the morning of August 20, 1966 she was a passenger in a Checker Cab proceeding to her destination of 63 W. Schiller Avenue, Chicago, Illinois. She further stated that when the cab was on Schiller Avenue, and very close to her destination, she leaned forward from the back seat with her money in hand and said "Aqui" (meaning "right here"). At this moment the driver forcefully applied the brakes, the door opened and she fell out of the cab with her upper body on the street and her legs still in the cab. She further testified that she was admitted





to a hospital on the following day where a cast was applied to her arm. Her arm remained in a cast for one-and-one-half or two months.

After her testimony the plaintiff was allowed to file an amended complaint, as the original complaint filed alleged that she was injured while attempting to board a Checker Taxi on West Schiller Avenue.

The defendant introduced certain evidence that, it alleges, impeached the plaintiff's testimony. An emergency room nurse at Wesley Memorial Hospital testified that she prepared plaintiff's history on the form provided. The emergency room record contained the statement that: "plaintiff stated she had emergency care at Corbett's Clinic after she fell while getting into Checker taxicab". Defendant also introduced the plaintiff's admission sheet from Wesley Memorial Hospital which stated in part: "Accident--Yes; If Yes, When did it occur?--Slipped". The defendant also introduced the plaintiff's original complaint which recited that she was injured while boarding the cab on West Schiller Avenue.

At the conclusion of the case the trial judge considered all the evidence and concluded that the plaintiff had failed to establish her case by the preponderance of the evidence and awarded judgment to the defendant.

Although a trial court's holding is always subject to review, it will not be disturbed unless it is manifestly against the weight of the evidence. (Schulenburg v. Signatrol, Inc. (1967) 37 Ill.2d 352, 226 N.E.2d 624.) The trial judge as the trier of fact is in a position superior to a court of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof.

It is well-settled that a judgment is not against the manifest weight of the evidence unless an opposite conclusion is clearly evident. (Shatkus v. Checker Taxi Co., Inc. (1969)





111 Ill.App.2d 1, 249 N.E.2d 704.) In the instant case there was sufficient evidence upon which the trial judge could base his finding and his judgment is not against the manifest weight of the evidence and, therefore, will not be disturbed. Sawchyn v. Samlow (1969) 109 Ill.App.2d 363, 248 N.E.2d 763.

Judgment affirmed.

McNamara, P.J. and Dempsey, J., concur.







No. 58678

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
GARRETT WATSON,	)	HONORABLE
	)	IRWIN COHEN,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Garrett Watson, defendant, was found guilty after a bench trial of the offenses of theft and battery in violation of sections 12-3 and 16-1(a)(1) of the Criminal Code. (Ill.Rev.Stat. 1971, ch.38, pars.12-3, 16-1(a)(1).) He was sentenced to a term of six months in the House of Correction on each charge, the sentences to run concurrently.

Defendant appeals, arguing first that he was improperly convicted and sentenced for both theft and battery, since both crimes arose out of the same course of conduct. It is error to sentence a defendant for two or more offenses if each offense arose out of the same conduct. (People v. Duszkevycz, 27 Ill.2d 257, 189 N.E.2d 299.) The State, in its brief, agrees that the defendant was improperly sentenced for both offenses. After an examination of the entire record, we agree that the conduct which constituted the battery and the theft constituted but a single transaction and it was error to sentence defendant for both offenses. The sentence imposed on the battery charge must therefore be vacated.

Defendant's only remaining contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. At trial, Will Sanders testified that as he was returning home from cashing a Social Security check at a currency exchange, he was grabbed by two men who pushed him into a gangway, struck him and took \$84 in United States currency.



He was unable to identify either man because during the incident they both stayed behind him.

Kenneth Knight testified that he witnessed the attack upon Sanders and positively identified the defendant, whom he had known prior to the incident, as one of the offenders. When the police arrived upon the scene, Knight told them where they could find the defendant.

Chicago Police Officer C. Johnson testified that upon arriving at the scene, Knight informed him that the defendant was one of the robbers. Knight told him where he could find the defendant. Johnson went to the address provided by Knight where the defendant was placed under arrest.

This evidence was sufficient to support defendant's conviction, even though defendant presented evidence to the contrary. No error of law appears in the record and a full opinion by this court would have no precedential value. A review of the entire record leads to the conclusion that there is no reasonable doubt as to defendant's guilt.

This opinion is filed pursuant to Illinois Supreme Court Rule 23.

The judgment of conviction on the charge of battery is modified by vacating the sentence and the judgment of the circuit court of Cook County, as modified, is affirmed.

Judgment affirmed as modified.

Third Division. Mr. Justice Mejda did not participate.







NO. 58064

PEOPLE OF THE STATE OF ILLINOIS, )	APPEAL FROM THE
Plaintiff-Appellee, )	CIRCUIT COURT OF
v. )	COOK COUNTY
JOHN LESTER, )	
Defendant-Appellant. )	HONORABLE
	MAURICE D. POMPEY,
	PRESIDING.

\*  
PER CURIAM (First District, Fifth Division):

John Lester, defendant, and Tracy Anderson were both charged by complaint with the crime of aggravated assault in violation of section 12-2(a)(1) of the Criminal Code. (Ill. Rev. Stat. 1971. ch. 38, par. 12-2(a)(1).) After a bench trial both were found guilty and Lester was sentenced to a term of seven months while Anderson was sentenced to a term of ten months. Lester alone appeals, arguing: (1) that the evidence was insufficient to establish his guilt beyond a reasonable doubt; (2) that his mere presence at the scene of the offense was insufficient to establish his accountability for the actions of his co-defendant; and (3) that the statutory treatment of 17 year old males as adults while affording 17 year old females protection under the Juvenile Court Act, constitutes a denial of equal protection.

At trial, the following evidence was adduced: Raymond J. Sterczynski testified for the State: that on April 29, 1972, at 10:30 P.M., he and his wife were getting into their car which was parked at 5440 S. Bishop, Chicago, Illinois, when Tracy Anderson and two other men, whom he could not identify, came up behind him, produced a gun and demanded his money. There were street lights on the east side of the street, 45 feet south of the alley and 50 feet north on the east side of the street. While Anderson warned Sterczynski's wife to keep her hands out of her pocket Sterczynski jumped into the car and slammed the car door. Anderson put the gun up to the window and fired. A minute and a

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\*Mr. JUSTICE DRUCKER did not participate.





half or two minutes elapsed between the time Sterczynski first saw the men until the time he jumped into his car.

Frances T. Sterczynski testified for the State: that on April 29, 1972, she and her husband were getting into their car when three men approached from the driver's side. One man produced a revolver. She identified Tracy Anderson and defendant, John Lester, as two of the men. Lester was standing directly behind Anderson. While Anderson was telling her to keep her hands out of her pocket her husband jumped into the car and slammed the door. Anderson fired four shots through the car window. She was seated on the passenger's side of the vehicle at the time the shots were fired. Later that evening she attended a line-up where she identified defendant Lester, but did not identify Anderson. She stated that she was nervous at the line-up.

Constance Morgan testified for the defense: that on April 29, 1972, Tracy Anderson and John Lester came to her house at approximately 6:30 or 7:00 P.M. and remained there until 10:30 P.M. As they left her house the police arrested them in front of the home.

Raymond Morgan testified for the defense: that John Lester and Tracy Anderson came to his home on April 29, 1972, at approximately 6:00 or 7:00 P.M. and stayed there until 11:30 or 12:00 P.M.

John Lester, defendant, testified that on April 29, 1972, he went to Mr. and Mrs. Morgan's house at 6:30 P.M. and remained there until 10:30 P.M. As he and Anderson left the Morgan home they were placed under arrest.

Tracy Anderson testified that on April 29, 1972, at 6:30 P.M., he and Lester went to the Morgan home where they danced and listened to music. As they left the Morgan home they were placed under arrest.

#### OPINION

Defendant's first contention on appeal is that the evidence is insufficient to establish his guilt beyond a reasonable doubt. Defendant bases this argument on four grounds: (1) that Mrs. Sterczynski



failed to identify his co-defendant in a line-up; (2) that Mrs. Sterczynski failed to articulate any distinguishing characteristics of defendant; (3) that Mr. Sterczynski failed to identify defendant; and (4) that defendant's alibi was positive and unimpeached.

In a bench trial, credibility of witnesses is for the trial judge to determine. (People v. Wright, 3 Ill. App. 3d 262, 278 N.E.2d 175.) The decision of the trier of fact as to credibility of witnesses will not be disturbed on review unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt. (People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378; People v. Daugherty, 1 Ill. App. 3d 290, 274 N.E.2d 109.) The testimony of one witness, if positive and credible, is sufficient to sustain a conviction, even though contradicted by the accused. People v. Bonds, 132 Ill. App. 2d 827, 270 N.E.2d 575.

In the case at bar, Sterczynski testified that as he and his wife were entering their parked automobile, they were approached by three men who announced a holdup and fired four shots into their car. Although he was not able to identify defendant, Mrs. Sterczynski did identify him as one of the offenders. Her testimony was positive and credible. The fact that she failed to identify the co-defendant in a line-up is at best a matter of credibility for the trial judge to determine. She positively identified the defendant in a line-up, as well as at trial. Similarly, her failure to articulate any of the defendant's distinguishing facial characteristics does not destroy her testimony since precise accuracy in describing a defendant's facial characteristics is unnecessary where the identification is positive. (People v. Miller, 30 Ill. 2d 110, 195 N.E.2d 694.) The fact that Sterczynski failed to identify defendant did not in any way affect defendant's identification by Mrs. Sterczynski. Sterczynski's attention was focused upon the man holding the gun, Tracy Anderson, and not upon defendant. After seeing and hearing the witnesses, the trial judge





found that the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt. After a complete review of the record, we cannot say that his determination was erroneous. The State's evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant also argues that his alibi testimony was sufficient to create a reasonable doubt as to his guilt. A trial judge is not obliged to believe the alibi testimony of defendant over the positive identification of the accused, even though the alibi may be established by a greater number of witnesses. (People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462; People v. Gaiter, 8 Ill. App. 3d 784, 291 N.E.2d 172.) In the case at bar, the trial judge, who observed the demeanor of witnesses during trial, found that defendant was a perpetrator of the crime charged and where, as here, that finding is based upon sufficient evidence, this court will not reverse that finding.

Defendant's second contention on appeal is that his mere presence at the scene of the crime or his negative acquiescence to the commission of the crime is not sufficient to establish his accountability for that offense. Section 5-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 5-2.) provides that a person is legally accountable for the conduct of another when:

"(c) Either before or during the commission of an offense, with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

Where defendants have a common design to do an unlawful act, the acts of any one of them, done in furtherance of the common design, is the act of all. (People v. Jones, 12 Ill. App. 3d 643, 299 N.E.2d 77.) Proof of a common design need not be supported by words of agreement, but can be drawn from the circumstances surrounding the commission of the act. (People v. Richardson, 32 Ill. 2d 472, 207 N.E.2d 478.) While the mere presence at the scene of a crime is insufficient to establish accountability (People v. Rudolph, 12 Ill. App. 3d 420, 299



N.E. 2d 129.), proof that a person was present at the commission of a crime without disapproving or opposing the crime may be considered with other circumstances. People v. Hill, 39 Ill. 2d 125, 233 N.E.2d 367.

In People v. Ramos, \_\_\_\_ Ill. App. 3d \_\_\_\_, 303 N.E.2d 439, Ramos, Colon, Munoz and Davilla were convicted of theft. The evidence at trial demonstrated that all four men approached the complaining witness together. While Munoz stopped complainant and engaged him in conversation, Colon produced a gun and pushed him over to the side, where Ramos took his money. During the actual robbery, Munoz and Davilla stood approximately one foot away from complainant on each side. On appeal, Munoz and Davilla argued that the evidence was insufficient to establish that they were accountable for the acts of their co-defendants. This court rejected that contention, holding that the evidence was sufficient to establish that defendants aided and abetted and were accountable for the conduct of their co-defendants.

In the case at bar, as Mr. and Mrs. Sterczynski were getting into their automobile, all three men approached them together. While Anderson held a gun upon the victims and announced a robbery, the defendant stood directly behind him. After Mr. Sterczynski got into his automobile, Anderson fired four shots through the window, with defendant standing behind him. Defendant did not at any time disapprove or oppose the actions of his co-defendant. From the totality of these circumstances, the trial judge could reasonably have found that defendant Lester was more than just an innocent bystander and that he had lent his approval to the robbery by aiding and abetting in its commission. This evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant's final contention on appeal is that the statutory treatment of 17 year old males as adults, while affording 17 year old





females protection under the Juvenile Court Act, constitutes a denial of equal protection. In People v. McCalvin, 55 Ill. 2d 161, 302 N.E. 2d 342, the Illinois Supreme Court rejected this identical argument.

The judgment of the circuit court is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]





NO. 58354

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. )  
 )  
 FRANCIS BAKER, )  
 )  
 Defendant-Appellant. )

APPEAL FROM THE  
 CIRCUIT COURT OF  
 COOK COUNTY

HONORABLE  
 MARVIN E. ASPEN,  
 PRESIDING.

\*

PER CURIAM (First District, Fifth Division):

Defendant was charged by indictment with the murder on February 19, 1971, of her two year old daughter, Elaine Baker, in violation of section 9-1 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 9-1.) After a bench trial, the defendant was found guilty of the lesser included crime of involuntary manslaughter and sentenced to a term of one year to ten years. On appeal, she contends that the State failed to prove her guilty beyond a reasonable doubt, arguing that the evidence established no criminal agency connected to the death in question; that a reasonable hypothesis was created by the evidence that the death was accidental; that inadmissible evidence was introduced concerning prior misconduct on the part of the defendant, allegedly unconnected with the offense charged; that the trial court erroneously failed to conduct a competency hearing, after evidence was adduced which allegedly raised a question as to defendant's competency to stand trial; and that the sentence imposed is excessive.

The following evidence was adduced at trial.

Sam Smith for the State:

He was 23 years of age and defendant's nephew. On January 21, 1971, he came to Chicago with defendant and two of her children, Alexander and Elaine, and they lived in an apartment on West Congress Parkway. He further testified that defendant beat Elaine with a belt on three separate days because Elaine looked like defendant's ex-husband's mother. Later in

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\* Mr. JUSTICE DRUCKER did not participate.





February, after moving to another apartment, defendant ran hot water in the bathtub and burned the baby's legs and feet until they blistered. A week later, they all moved to a third apartment, on West Jackson Boulevard, during which stay he heard defendant state a whole lot of times that she did not like Elaine. He saw her strike the child in the head with a knee-high boot with a hard heel, causing the child to bleed and cry. Defendant then commented that she did not intend to hit the child "that hard." The witness further testified that defendant struck Elaine with an extension cord about four times, until both ends of the cord broke off. Elaine had suffered welts therefrom and had become ill. He washed and cleaned her up. He was unable to establish specific dates on which those beatings occurred, but stated that the boot striking incident occurred about four days before Elaine was hospitalized and the cord striking incident about two days before. He did not know the exact date that Elaine was admitted to the hospital but he was certain that she was struck with the boot four days before she was admitted and that she was beaten with the extension cord seven [sic] days before.

On the day that Elaine was admitted to the hospital, she had become ill and dirtied herself. He bathed her in the bathroom and, while there, she fell to the floor on her back; he did not know what part of the child's body struck the floor and he told the grand jury that she had fallen on her face. The child was breathing when he picked her up, he tried to waken her, and he did not know anything was wrong with her, he thought she was asleep. Clarence Blake, defendant's brother, arrived in the apartment on that day and the witness told him that Elaine was asleep on the couch. Defendant was not at home at the time of Elaine's fall. She arrived home about 11:00 P.M., the witness told her that the child was ill, and she accused him of beating the child.

He had spanked the child with his hand "while on Congress." Defendant did not beat the child on the day she was admitted to the hospital. He identified photographs of the body of the child upon a



hospital bed, testifying that the marks and bruises which appeared on the body were not present when the family moved from Mississippi to Chicago in January. (The court noted during the course of this witness's testimony that "he is not very bright.") It was later stipulated that the witness's testimony before the grand jury could be admitted into evidence for impeachment purposes.

Garland Baker, for the State:

He had been married to defendant from 1964 to 1969, and three children were born of the marriage, one of whom was Elaine, born on August 19, 1968. Several days after Elaine's birth, defendant told him that she did not want a little girl, that the child was too much like "Your goddamn black mammy.... She is too much like your mammy and I hate her." He separated from the defendant seven months later, during which period defendant beat the child. On February 18, 1971, he told defendant that he wished to take the child to the doctor, but defendant refused. He stated that the police would take the children from her, and defendant replied that she would kill the children before she would allow him to take them. He also viewed the photographs of the body of Elaine and testified that the scars present about the body were not present when he identified the body in February. He did not see defendant strike the child during that month.

Wallace Blake, for the State:

He is a brother of defendant and also known as Clarence Blake. He was aware that Elaine entered the hospital on February 20, 1971, and that she subsequently died. He observed burns on the child's feet approximately one week prior to that date, for which he ordered medication, but he observed no other marks on the child. He had told defendant that Elaine should see a doctor, but defendant had refused. The last time he saw Elaine alive was in the hospital; on a date prior to her admission into the hospital he saw the child on a couch at the Jackson Boulevard apartment and Sam Smith was present; Smith remained with the child when the witness left the apartment.

Officer Booker T. Porter, for the State:





He is a Chicago police officer and had a conversation with defendant at about 3:00 A.M. on February 20, 1971, during which she told him that she had returned home from work about 11:30 P.M. on February 19th and found Elaine lying unconscious on the couch; she asked Sam Smith what had happened to her and Smith related that he was washing the child in the bathroom and that she fell and struck her head. The witness questioned defendant concerning the scars and marks about the child and defendant related that some of the marks were on the child when she was in Mississippi, some were inflicted by Sam Smith, and some were inflicted by defendant herself. Defendant told the witness that she had beaten the child with a shoe. Defendant also told him that she had to chastise Smith for spanking Elaine.

Edward Shalgos for the State:

He is a coroner's physician and performed a "complete autopsy" on the body of Elaine Baker on February 24, 1971. The external examination revealed fully and partially healed scars about the body and head. The internal examination revealed two distinct areas of hemorrhagic change under the surface of the scalp which were related to separate traumas; the brain was "significantly swollen" and contained a hematoma (solid hemorrhage) on the left side. The child died of diffused secondary pneumonia which was incidental to the swollen brain and caused by injury to the brain or skull contents, with an associated presence of sub-dural hematoma; the condition was incidental to the "chronic battered child's status." The hematoma found in the child's skull was sub-acute, meaning that it had existed for no less than six days nor more than ten days prior to his examination. Theoretically, it was a "possibility" that the sub-dural hematoma found in the child could have been caused by a fall to a bathroom floor, but the witness could not conceive how a single fall could have caused the condition found in the examination.

Wallace Blake and Laverne Green, for the defendant:

Blake had visited defendant's apartment about 5:00 P.M. on a



date which he could not specify, where he spoke to Sam Smith who told him that Elaine Baker had fallen and was asleep on the couch. Green saw the child on the day prior to her admission to the hospital, seated on the couch and eating, and later saw her prior to the arrival of the fire department ambulance, lying unconscious on the couch; the witness also observed scars on the child's foot and arms.

Defendant, Francis Baker, in her own behalf:

She was 29 years of age and she was not living with her ex-husband at the time that Elaine was born. She never referred to Elaine in obscene terms in front of her ex-husband, and she did not beat Elaine when she and her ex-husband had been living together. She struck the child only with her hand when she spanked the child, and did not beat the child the day she was taken ill. During the period between January 21, 1971, and February 19, 1971, she did not strike her daughter in the head with a boot, nor did she tell Sam Smith or anyone else that she did not like her daughter. She loved her daughter. She observed Sam Smith beat her daughter, about four or five days before "this happened to her." She saw him spank her child with a belt and with his hands, and she told him not to whip the child. The first time that she told anyone that Smith had struck the child was when she told the police, after the child was in a coma. Defendant did not recall telling Officer Porter that she had spanked her daughter with a boot, she could not recall her brother asking permission to take Elaine to the doctor, and her ex-husband did not ask to take Elaine to the doctor during the week of February 14, 1971. The marks on the child were not present when she brought her from Mississippi, but the child received those marks on the night she was taken to the hospital.

At the close of the evidence the trial court again commented that although Sam Smith was not a man of "acute intelligence," the court was "firmly convinced" that he was telling the "absolute truth," whereas defendant's demeanor was such as to create a reasonable doubt as to her credibility. The court further found that the coroner's pathologist's





testimony negated any possibility of death having been due to the "accident or fall" which had occurred prior to the death of the child. During the hearing in aggravation and mitigation defendant related to the court that she had been hospitalized for a period of a week for a "nervous breakdown" about a year prior to trial and prior to her having returned to Mississippi, and that she had not received out-patient care and did not return to the hospital thereafter.

#### OPINION

Defendant contends that the evidence adduced by the State failed to establish her guilt beyond a reasonable doubt, inasmuch as it allegedly failed to establish the existence of a criminal agency connected with the death of Elaine Baker and further that it allegedly did establish the death was accidental. The main thrust of defendant's contention centers around the pathologist's testimony that the hematoma found upon the autopsy of the child's body could have been caused when the child struck her head on the bathroom floor when she fell.

Direct evidence of death in matters involving the offense of involuntary manslaughter is not always necessary to prove the commission of that offense; the means and manner of death may be inferred from the circumstances proved. (People v. Brown, 83 Ill. App. 2d 411, 228 N.E.2d 495.) Sufficient evidence was adduced from which the trier of fact could reasonably have found that the death of Elaine Baker was due to criminal action, namely, the intentional and deliberate striking of the child by defendant.

The trial court heard evidence that defendant struck the child in the head with the heel of a boot about four days prior to the child's hospitalization, causing the child to bleed and cry, and prompting the defendant to state that she did not intend to strike the child "that hard"; the evidence also disclosed that defendant whipped the child with an extension cord two days later, causing swelling in the child and also causing the cord to break. Evidence was adduced that the hematoma and the swelling found in the brain upon autopsy of the child about four days after her hospitalization, which was the ultimate cause of the





child's death, had occurred no less than six days nor more than ten days prior to the autopsy; evidence was also adduced that the external portions of the child's body bore scars and marks which were both fully and partially healed. Criminal agency in the death of Elaine Baker was proven by the State.

The further argument raised by defendant that the cause of death was accidental is likewise without merit. The pathologist did testify that it was a "possibility" that the condition of the child's brain could have been caused by a fall to the floor; however, the evidence adduced as to the time of that fall and as to the time element relative to the presence of the hematoma renders such conclusion precisely as characterized by the pathologist, a "possibility" only. The evidence adduced by the State established defendant's guilt beyond a reasonable doubt; the State was not required to establish, as impliedly argued by defendant, guilt beyond a possibility of a doubt. People v. Brown, 83 Ill. App. 2d 411, 228 N.E.2d 495.

The cases cited by defendant in support of this contention are not applicable. People v. Melquist, 26 Ill. 2d 22, 185 N.E.2d 825; People v. Wilson, 400 Ill. 461, 81 N.E.2d 211; People v. Holtz, 294 Ill. 143, 128 N.E.341; People v. Ibom, 25 Ill. 2d 585, 185 N.E.2d 690.

Defendant's contention that the trial court improperly allowed into evidence testimony relative to prior misconduct by her with the child is likewise without merit. Those matters complained of by defendant involved defendant's prior relationship with the deceased, from the standpoint of both her attitude and her actions toward her own two year old child. It was brought out that defendant disliked the child almost from the day it was born, that she expressed a willingness to kill the child, that she beat the child on several occasions, and that apparently severe beatings were inflicted during the boot and the extension cord incidents. All of those matters were relevant to show intent, motive and absence of accident in the infliction of the blow or blows which ultimately led to the child's death. (See People v. Brown, 83 Ill. App. 2d 411, 228 N.E.2d 495; People v. Johnson, 93 Ill. App. 2d 184, 236 N.E.2d 388.) The case of People v. Cage, 34 Ill. 2d 530, 216 N.E.2d



805, cited by defendant in support of this position, is not in point.

Defendant further contends that the trial court erred in failing to conduct a competency hearing upon being advised that defendant had a history of mental disorder. At the time that the matter was raised, neither defendant nor her counsel raised any question as to whether she was able to cooperate with counsel in her defense or whether she understood the nature of the charge against her. The facts concerning the hospitalization were brought to the attention of the trial court, who had observed defendant during the trial and, specifically, while she testified in her own behalf, and at no time did any question arise as to her competency to stand trial. While a trial court ordinarily has the duty to order a competency hearing where facts brought to the court's attention raise a bona fide doubt whether a defendant is competent to stand trial, such doubt is not created solely by the trial court's being advised that defendant had been hospitalized for a mental disturbance sometime in the past. (People v. Richeson, 24 Ill. 2d 182, 181 N.E.2d 170.) The trial court did not abuse its discretion in not ordering a competency hearing under these circumstances. (People v. Thompson, 3 Ill. App. 3d 684, 278 N.E.2d 1.) The case of Pate v. Robinson, 383 U.S. 375, cited by defendant, is clearly distinguishable on its facts from the instant situation.

The final contention raised by defendant is that her sentence is excessive in light of the sentencing provisions of the Unified Code of Corrections. She argues that involuntary manslaughter is presently classed as a Class 3 felony, that the minimum term of years imposed upon a Class 3 felony cannot exceed one-third the maximum term imposed (Ill. Rev. Stat. 1972, Supp. ch. 38, par. 1005-8-1, par. 9-3(c).) and she concludes therefore that the maximum term imposed should not exceed three times the minimum term imposed, which in the instant case is one year.

There is nothing in the Code requiring that the maximum term





imposed for a Class 3 felony be limited to three times the minimum term imposed. Further, in the instant case, the trial court commented that he was imposing the minimum and the maximum terms provided by statute, with the observation that the Parole and Pardon Board would have adequate leeway in dealing with the defendant as to whether she will have been rehabilitated in light of the circumstances and offense of which she was found guilty. There is no merit to this contention.

The judgment of the circuit court is affirmed.

Affirmed.

[Publish abstract only.]



No. 58598



PEOPLE OF THE STATE OF ILLINOIS, )  
   )  
           Plaintiff-Appellee,      )  
   )  
                   v.                  )  
   )  
 EDDIE HORTON,                      )  
   )  
           Defendant-Appellant.      )

APPEAL FROM THE  
 CIRCUIT COURT OF  
 COOK COUNTY

HONORABLE  
 JOHN J. CROWLEY,  
 PRESIDING.

\*

PER CURIAM (First District-Fifth Division):

Eddie Horton and co-defendant Jerome Latimore were found guilty after a bench trial of the offense of theft, in violation of section 16-1(a)(1) of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1).) and Horton was sentenced to a term of six months in the House of Correction. Latimore was sentenced to nine months in the House of Correction. Only Horton appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

William J. Lynch, a witness for the State, testified:

He was returning home on a Halsted Street C.T.A. bus on September 10, 1972, and was sitting on the second to the last seat when a group of five or six youths boarded the bus at about 1500 or 1600 S. Halsted Street. After some conflict about paying fares, the youths sat down with Latimore and defendant occupying a seat in front of him and the others sat in the rear. After about 17 minutes travel and when the bus reached 1100 N. Halsted Street, one of the youths in back of him, seized him by the arms and at the same time defendant struck him on the head with a walking cane. Latimore then ruffled his pockets and took an AM-FM Motorola radio, a gold watch and his wallet containing \$30 to \$33. The men fled the bus and the witness was taken to Henrotin Hospital for treatment of a laceration on his head and released. He observed defendant with a cane and provided the police investigators with an approximate description of his clothing.

Defendant testified on his own behalf:

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\* Mr. JUSTICE BARRETT did not participate.



He testified that he was able to observe the defendant when he got on the bus and for two to three minutes during the incident. This testimony provided a sufficient basis upon which the trial judge determined that Lynch saw defendant for a sufficient period of time so as to fix his identity. (People v. Wright, 10 Ill. App. 3d 1035, 295 N.E.2d 510.) After a complete review of the record, we cannot say that the trial judge's determination was erroneous.

Defendant's alibi defense does not raise a reasonable doubt as to his guilt since the trial judge is not obliged to believe a defendant's alibi testimony. People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462.

The judgment of the circuit court is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]





On September 8, 1972, he left Chicago with a friend and his fiancée to drive to Indianapolis, Indiana, to attend his uncle's funeral. He stayed with his aunt, his father, mother, and other relatives who were also present and he left on Sunday, September 10, 1972, at 5:00 P.M., on a Greyhound Bus. He produced two tickets bearing numbers 14177829502 and 14262103242 which he said he had purchased for himself and his fiancée at the same time. The bus arrived in Chicago at 7:55 P.M.

Two other witnesses corroborated Horton's testimony.

The trial judge found defendants guilty on the charge of theft. Only defendant appeals from the finding.

#### OPINION

Defendant's only argument on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the identification testimony was not trustworthy. This court has often stated the rule that in a bench trial, credibility of witnesses is for the trial judge to determine. The decision of the trial judge as to credibility will not be disturbed on review unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt. (People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378; People v. Wright, 3 Ill. App. 3d 262, 278 N.E.2d 175.) The testimony of one witness, if positive and credible, is sufficient to sustain a conviction, even though contradicted by the accused. People v. Bonds, 132 Ill. App. 2d 827, 270 N.E.2d 575.

~~In the case at bar~~, a review of the entire record leads to the conclusion that the evidence was sufficient to sustain defendant's conviction beyond a reasonable doubt. The testimony of William Lynch was positive and credible. He testified that he observed the defendant and several other men get on the bus. The defendant and another man sat in front of him while the other men sat behind him. While one of the men grabbed him from the rear, defendant hit him with a cane and Latimore went through his pockets, taking his radio, watch and money.





59047

M. LUCILLE HARDIN,	)	
Plaintiff and	)	APPEAL FROM
Counter Defendant-Appellee,	)	
	)	CIRCUIT COURT
vs.	)	COOK COUNTY
	)	
CALVIN L. HARDIN,	)	HON. GLENN T. JOHNSON,
Defendant and	)	Presiding
Counter Plaintiff-Appellant.	)	

MR. JUSTICE BURKE delivered the opinion of the court:

Plaintiff filed a complaint for divorce. Defendant filed an answer and a counter-complaint for divorce and for partition of the real estate owned by the parties as joint tenants. The court awarded the defendant a divorce on his counter-complaint. The court further ordered that title to the marital property remain in joint tenancy, that the parties be enjoined from partition, that exclusive possession of the property be awarded to the plaintiff (the defendant being ordered to vacate and not re-enter the premises), that plaintiff pay for the upkeep of the property, that both parties pay their respective attorney's fees and waive alimony, and that the plaintiff be awarded the household furniture and fixtures.

The defendant filed a petition to vacate part of the decree and to modify the decree by severing the joint tenancy to permit partition of the realty and to reserve the court's ruling on a disposition of the marital home. After a hearing the court denied the petition. This appeal followed.

Defendant has filed his brief and excerpts and complied with all the statutory requirements and rules of this court for prosecuting an appeal. No appearance or brief has been





filed by the plaintiff. Since she has failed to comply with the rules of this court, we need not consider the cause on the merits. (Latronica v. Latronica, 97 Ill. App. 2d 332, 240 N.E.2d 458; Basinski v. Basinski, 20 Ill. App. 2d 336, 156 N.E.2d 225; C.I.T. Corp. v. Blackwell, 281 Ill. App. 504.) The order denying the defendant's petition to vacate part of the decree is reversed and the cause remanded with directions to allow the petition to vacate the part of the decree enjoining the parties from seeking partition of the realty and for other proceedings not inconsistent with this opinion.

ORDER AND DECREE REVERSED IN PART  
AND CAUSE REMANDED WITH DIRECTIONS.

EGAN, P.J. and HALLETT, J., concur.





No. 58437

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
ROBERT BELL,	)	HONORABLE
	)	SAUL A. EPTON,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM: .

After a bench trial, the defendant was found guilty of three counts of armed robbery and one count of theft. He was sentenced to not less than three years nor more than eight years on each count, all sentences to be served concurrently. Count 1 of the indictment pertained to the armed robbery of Andrew Kolek, Count 2 to the armed robbery of John Small, Count 3 to the armed robbery of Robert Fencel, and Count 4 to the theft of an automobile.

The issues on appeal are whether the defendant was proven guilty beyond a reasonable doubt of armed robbery and whether the sentence for theft was excessive.

On November 23, 1970, at approximately 10:20 P.M., the defendant and two other persons entered Vick and Andy's Tavern, 3325 West Cermak Road, Chicago, and announced a holdup.

Robert Fencel testified that he was in the tavern at the time and was ordered to lie on the floor; that he was robbed of \$140; that there were two persons, beside the person who took his money, who participated in the robbery; and that he did not see any of their faces.

Andrew Kolek, the bartender, testified that he was behind the bar, walking toward the back of the tavern, when he heard someone say, "This is a stickup, turn around, and I mean it"; that he turned around and saw a pistol in front



of him; that two persons came behind the bar and took \$40 or \$50 from the cash register, as well as a number of Kennedy half-dollars, which were used for the jukebox; that he did not recall the exact number of Kennedy half-dollars in the register but stated that he usually kept about fifteen; and that the robbers also took \$40 or \$50 from him. Kolek said that he could not identify any of the robbers. However, he did testify that the gun, shown in Plaintiff's Exhibit No. 1, looked like the gun that was pointed at him at the time of the robbery.

Mildred Hora testified that she was in the tavern at the time of the robbery; that a man she could not recognize forced her into the back room of the tavern; that while one of the men was robbing a patron, she looked toward the front of the tavern and saw the "other man"; that the defendant, whom she identified at the trial, was the "other man"; that the lighting conditions in the tavern at the time were good; and that no money was taken from her. On cross-examination, Mrs. Hora testified that she only had a quick glance at the defendant; that she looked at his face and pants; that the defendant wore a pair of light pants; that he had a small mustache; that she identified the defendant from a series of photographs as well as identifying him at the lineup; and that the defendant is number two man from the left on Plaintiff's Exhibit No. 2, a photograph showing the lineup on November 24, 1970.

The defendant, through his counsel, stipulated that during the evening of November 23, 1970, he took Buck Randall's 1964 Electra 225 without his consent; that Randall did not





know him; that the car's ignition was damaged; and that defendant was driving a stolen automobile at the time of his arrest.

Lonnie Segroves, a police officer for the City of Chicago, testified that in the early morning of November 24, 1970, he arrested Robert Bell, Michael Ross and John Coleman; and that at the time of the arrest the defendant, whom Segroves identified at the trial, was driving Randall's automobile, which had been reported stolen earlier that night. Segroves further testified that he searched Ross and found a weapon in his pocket; that the weapon was inventoried with the police department; that the weapon shown in Plaintiff's Exhibit No. 1 is the weapon he recovered from Ross; and that the gun was loaded. Segroves stated that the defendant, Ross and Coleman were taken to the police station, where he spoke to another police officer who said that they "fit the description of a robbery that had occurred earlier that night"; and that he checked the robbery police report and they did fit the description of the men involved in the robbery at Vick and Andy's Tavern, which occurred on November 23, 1970.

Segroves further testified that there was approximately \$302 taken from the tavern and approximately \$246 was recovered; that \$83.16 was recovered from Michael Ross, including eleven Kennedy half-dollars; that \$76.90 was recovered from the defendant, including ten Kennedy half-dollars; that \$88.40 was recovered from John Coleman; and that they recovered a total of twenty-one Kennedy half-dollars. On cross-examination, Segroves testified that the defendant had a mustache and that when arrested he was wearing an orange and green shirt with a gray jacket.

The defendant testified that on November 23, 1970, at



approximately 10:45 P.M., he borrowed a 1964 Buick from Frank Layman without knowing that the car was stolen; that Ross and Coleman accompanied him to a 24-hour combination drug, liquor and delicatessen store; and that he bought a box of Pampers, a gallon of milk and some pop. Defendant further testified that at the time of his arrest he was wearing light green trousers and he also had on a dark green sweater and a gray coat; that he was not wearing anything that was light or tan that night; and that he does not remember what Coleman and Ross were wearing. The defendant said he didn't go to Vick and Andy's Tavern that night; that he has never been in the tavern; and that before he was arrested he did not know where the tavern was located. He also testified that he did not have any Kennedy half-dollars in his possession that night; and that he saw some Kennedy half-dollars at the police station which belonged to Ross and Coleman. On cross-examination, the defendant testified that he did not know Ross had a gun.

The trial court stated that Mildred Hora was the only witness to identify the defendant, that at first her testimony was "I took a quick glance" and then, on further questioning, she said "Took a quick glance in which to take a look at him", and that if this was the only testimony there might be some question in the court's mind as to whether or not the State proved a case beyond a reasonable doubt, but that the court must take into consideration all of the circumstances that occurred in its entirety, and when within hours after an incident is alleged to have occurred the defendant is driving a stolen automobile and he has approximately one-third of the loot obtained in the tavern, the court must come to only one conclusion. The trial court further stated that the defendant "had a defense, and his defense





was pure fiction in the eyes of the court, frivolous and fictional" and that "going out at eleven o'clock to get a bottle of milk for his fiancée and winds up in a stolen car with two friends is nonsense. Impossible".

The defendant contends that the identification by Mildred Hora "does not measure up to the standard of satisfaction and reliability required in order that it may be utilized to prove an individual guilty of an offense beyond a reasonable doubt". The defendant also argues that the circumstantial evidence that the gun used in the robbery was the same gun found in the possession of Ross at the time the defendant, Coleman and Ross were in the stolen automobile, that a number of Kennedy half-dollars were taken at the time of the robbery, that Ross had eleven Kennedy half-dollars and the defendant had ten Kennedy half-dollars in their possession at the time they were arrested is not sufficient to sustain the conviction of armed robbery.

Relying upon People v. Dougard, 16 Ill.2d 603, 158 N.E.2d 596; People v. Brown, 27 Ill.2d 23, 187 N.E.2d 728, and People v. Puckett, 6 Ill.App.3d 206, 285 N.E.2d 258, the defendant contends that in order for circumstantial evidence to be sufficient to establish the guilt of the defendant beyond a reasonable doubt, it must be strong, convincing and sufficient so as to exclude every reasonable hypothesis of his innocence. Although the defendant correctly states the general principle of law, it is interesting to note that in the Brown and Puckett cases the courts held that the circumstantial evidence was sufficient to sustain the respective convictions.

Likewise, in the case at bar the evidence is sufficient to sustain the defendant's conviction of armed robbery.



Mildred Hora testified that the lighting conditions in the tavern at the time of the robbery were good and she identified the defendant in open court as one of the robbers. The testimony of a single witness, if it is positive and the witness is credible, is sufficient for a conviction even though the testimony is contradicted by the defendant. (People v. Cooper, 9 Ill.App.3d 291, 292 N.E.2d 79; People v. Robinson, 3 Ill.App.3d 858, 279 N.E.2d 515; People v. Watkins, 46 Ill.2d 273, 263 N.E.2d 115.) Precise accuracy in describing facial characteristics and wearing apparel is unnecessary where an identification is positive. People v. Catlett, 48 Ill.2d 56, 63, 268 N.E.2d 378; People v. Camp, 9 Ill.App.3d 445, 292 N.E.2d 242.

The testimony of Mrs. Hora and her identification of the defendant were positive. This testimony, coupled with the facts that a number of Kennedy half-dollars were taken in the robbery of Vick and Andy's Tavern, that the defendant had ten Kennedy half-dollars in his possession at the time he was arrested, that his companion Ross had a loaded gun in his possession at the time of his arrest which Kolek, the bartender, testified was like the gun used at the time of the robbery, and that the defendant was driving a stolen automobile, is sufficient evidence to establish the defendant's guilt beyond a reasonable doubt. People v. Bernette, 30 Ill.2d 359, 197 N.E.2d 436.

In a bench trial, the sufficiency of the evidence, the credibility of the witnesses, the weight to be given their testimony and inferences to be drawn therefrom are for the trial court, who saw and heard the witnesses testify, and its judgment should not be disturbed unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. (People v. Arndt, 50 Ill.2d



390, 396, 280 N.E.2d 230; People v. Clemons, 26 Ill.2d 481, 187 N.E.2d 260; People v. Sims, 5 Ill.App.3d 727, 283 N.E.2d 906.) In the case at bar, the evidence was neither improbable nor unsatisfactory and was sufficient to prove the defendant guilty beyond a reasonable doubt of armed robbery of Andrew Kolek and Robert Fencel.

The defendant, without citation of authority, argues that the imposition of the three to eight year sentence for theft of an automobile is excessive.

A sentence imposed by the trial judge, who sees the defendant and is in a better position to appraise him and evaluate the likelihood of his rehabilitation than a reviewing court, should not be reduced unless there are substantial reasons for doing so. (People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673; People v. Kendricks, 4 Ill.App.3d 1029, 283 N.E.2d 273.) In the instant case the defendant has failed to present any mitigating circumstances tending to confirm a likelihood of his rehabilitation. The maximum sentence of eight years for the offense of theft is within the ten year maximum set for a Class 3 felony by the Unified Code of Corrections. (Ill.Rev.Stat. 1972 Supp., ch.38, par. 1005-8-1(b)(4).) Therefore, the maximum sentence should be affirmed. However, the minimum term for a Class 3 felony is one year "unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term, which shall not be greater than one-third of the maximum term set in that case by the court". Ill.Rev.Stat. 1972 Supp., ch.38, par. 1005-8-1(c)(4).

Since the case at bar has not been finally adjudicated, the provisions of the Unified Code of Corrections are applicable. (People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1.)





The People concede that the minimum sentence of three years for theft exceeds one-third of the maximum of eight years and recommend that the minimum sentence be reduced in accordance with the provisions for a Class 3 felony.

(Ill.Rev.Stat. 1972 Supp., ch.38, par.1005-8-1(c)(4); People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) The minimum sentence for theft should be reduced to two years and eight months.

The judgment imposed on Count 2, the armed robbery of John Small, is reversed. The judgments entered on Count 1, the armed robbery of Andrew Kolek, and Count 3, the armed robbery of Robert Fenc1, are affirmed. The minimum sentence imposed under Count 4, theft, is reduced to two years and eight months and, as modified, the judgment entered on Count 4 is affirmed.

Judgment imposed on Count 2, the armed robbery of John Small, is reversed; Judgments entered on Count 1, the armed robbery of Andrew Kolek, and Count 3, the armed robbery of Robert Fenc1, are affirmed; The minimum sentence imposed under Count 4, theft is reduced to two years and eight months and, as modified, the judgment on Count 4 is affirmed.

Third Division. Mr. Justice Mejda did not participate.





58668

PEOPLE OF THE STATE	)	APPEAL FROM
OF ILLINOIS,	)	CIRCUIT COURT
	)	COOK COUNTY
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
JOHN LEWIS,	)	HONORABLE
	)	MAURICE W. LEE,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Defendant, John Lewis, was charged with theft in violation of section 16-1(a)(1) of the Criminal Code [Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)]. After a bench trial he was found guilty and sentenced to 90 days in the House of Correction. He appeals, contending: 1) he was not proved guilty beyond a reasonable doubt because there was no proof that Montgomery Ward & Co. was a corporation and that it owned the goods allegedly stolen by defendant; and 2) sentence should be vacated or modified because the court, in sentencing defendant, relied on an invalid prior marijuana conviction.

The complaining witness, Frank Kristoff, testified: On September 8, 1972, he was employed and working as a security guard for Montgomery Ward & Co., in the store at 140 South State Street. He observed the defendant enter the hardware department in the basement. Defendant picked up a drill from the counter, moved several items, then concealed in a Montgomery Ward bag the drill, an electric wiring book and one drill bit which he had taken from a display rack. After placing the items in the bag defendant looked around, then went from the south end of the store to the north, and was about to enter the State Street doorway when he was apprehended in the vestibule between the door and the subway. He had passed approximately six cashiers and sales personnel, but did not stop near any of them, and the security guard did not observe any transaction between defendant





and any of the sales personnel. When stopped by the guard the defendant still had the bag, and the guard recovered from it the items he had seen defendant take from the display rack.

The security guard told the defendant he had forgotten to pay for the merchandise. Defendant said he had not, and said nothing more. The guard further testified that the arrest occurred at approximately 5:30, when the subway entrance was open. At the time he stopped defendant he did not know whether he had any other articles from the Montgomery Ward store. He did not know what was in the bag and defendant did not inform him that he had made any other purchases in the store.

The guard further testified that Montgomery Ward is a corporation authorized to do business in Illinois, and identified the defendant as the person apprehended.

Defendant testified: He was in the Montgomery Ward store to buy a drill to make a crib for his two-month-old daughter and that he bought some light fixtures and light bulbs. He made the purchases in the basement at the hardware department. He asked one cashier if he could put the drill in will-call, since he had only \$16.00 with him. The cashier said he could not. He was on his way to the catalog section to ask whether he could order one when the security guard stopped him, grabbed him by the arm, called him a fool, took him around the back, then really roughed him up. When stopped he was about ten feet from the catalog section; he was not in the vestibule, but in a long hallway, about 50 feet long. A yellow sign in the middle of the aisle indicated the subway closed at 5:00 o'clock. It was then 5:30. He was stopped right by the catalog sales department which is about 40 or 50 feet from the subway. When the security guard said defendant left the doors of the store he was lying. He did not purchase the three items; he purchased some light fixtures and light bulbs.



In rebuttal the security guard testified: The defendant's testimony that the guard stopped him at or near the catalog counter and that there was a sign in the hallway leading to the subway stating it closes at 5:00 p.m. was not correct. The entranceway to the subway closes at 5:45 p.m.

Defendant argues that he was not proved guilty beyond a reasonable doubt because there was no proof that Montgomery Ward & Co. was a corporation and the owner of the property defendant was charged with stealing. In a prosecution for theft or attempt, ownership or some sort of superior possessory interest in one other than the defendant is an essential element of the offense. People v. Roach, 1 Ill. App. 3d 876, 275 N.E. 2d 309. Where it is alleged that the owner is a corporation, the legal existence of the corporation is a material fact which must be proved. People v. Gordon, 5 Ill. 2d 91, 125 N.E. 2d 73. However, essential elements of an offense may be proved by circumstantial evidence. People v. Rice, 109 Ill.App. 2d 391, 248 N.E. 2d 745.

In People v. Nelson, 124 Ill. App. 2d 280, 260 N.E. 2d 251, the court held that testimony of one who was on duty as a security officer for "Sears and Roebuck," and references in his testimony and in that of others, including one of the defendants, to "Sears," "Sears and Roebuck," "Sears Corporation," "Sears Warehouse" and "Sears Distribution Center at 2065 George Street in Melrose Park" was sufficient to prove the existence of Sears, Roebuck as a corporation and its ownership of the property burglarized. A similar conclusion was reached in People v. Jones, 7 Ill.App.3d 183, 287 N.E.2d 206.

In the instant case, the complaining witness—a security guard for Montgomery Ward—testified that Montgomery Ward was a corporation; that he saw defendant in the hardware department of



its State Street store pick up a drill, drill bit and wiring book from the display counter, place them in a Ward's bag, then start to leave the store by the subway entrance without paying for the items. In addition, defendant's own testimony that he asked if the drill could be put in will-call and that he did not purchase the three items in the bag can be construed as an admission that they were the property of Montgomery Ward & Co., Inc. Based upon this testimony the trial judge concluded that defendant's guilt had been established beyond a reasonable doubt. After a review of the entire record we cannot say that the trial court's conclusion was erroneous. People v. Catlett, 48 Ill.2d 56, 268 N.E. 2d 378.

Defendant also argues that his sentence should be vacated and the cause remanded for resentencing or, in the alternative, that the sentence be reduced because the trial court imposed sentence and denied probation, relying upon an invalid prior marijuana conviction for which defendant had previously been placed on probation.

After a finding of guilty, the following proceedings took place:

THE COURT: . . . What do you have in aggravation?

MR. MRIZEK (Asst. State's Attorney): August '72, one year supervision, charge of unlawful use of weapons involving an ice pick, Judge White; April, 1969, possession of marijuana, two years probation, Judge Wendt. There's also currently outstanding a bond forfeiture warrant two times of theft, it's under the name, Herbert Hudson, same Defendant, Herbert Willis, Hubert Wills, Theodore Green. State is recommending 90 days in the house.

MR. O'MALLEY (Asst. Public Defender): Your Honor, we ask for probation, if possible. This Defendant has received one year's supervision. Probation, 1969.

THE COURT: The Court believes that 90 days is reasonable.

Defendant's only prior conviction was for possession of marijuana in April of 1969, for which he received two years' probation from Judge Wendt. This violation was of a statute which was later





held unconstitutional in People v. McCabe, 49 Ill. 2d 338, 275 N.E. 2d 407. The McCabe case is retroactive in its application. People v. Hudson, 50 Ill.2d 1, 276 N.E.2d 345. Such a conviction cannot be considered in imposing sentence. United States v. Tucker, 404 U.S. 443.

No objection was made by defendant to the reference by the State to the prior marijuana offense conviction, and any error caused thereby was waived. People v. Trefonas, 9 Ill. 2d 92; People v. Donald, 29 Ill. 2d 283. However, the admission of inadmissible evidence which would otherwise be considered prejudicial in a jury trial will not be considered prejudicial in a bench trial unless it affirmatively appears of record that the trial judge placed reliance thereon in arriving at his judgment. People v. Jackson, 95 Ill. App. 2d 193, 199. A trial judge is presumed to disregard all evidence except that which is competent and relevant, and is considered to possess such legal discernment when determining the degree of punishment. People v. Grabowski, 12 Ill.2d 462.

The McCabe decision, which invalidated defendant's prior conviction, was filed in 1971, long prior to defendant's conviction and sentence herein on September 12, 1972. It cannot be presumed that the trial judge was unaware of the McCabe decision nor that the trial judge relied upon defendant's prior conviction in denying probation and imposing the sentence herein. The trial judge did not mention the marijuana conviction nor indicate any weight or consideration given thereto. The record does not support the conclusion that the trial judge considered or relied on the prior conviction, or that such conviction affected the sentencing. The sentence is well within the applicable statutory limits and should not be disturbed.

For the foregoing reasons, the judgment and sentence appealed from are affirmed.

Judgment affirmed.

THIRD DIVISION.

Justice Dempsey did not participate.





58814

SAMUEL BAILEY,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
ADDIE LEE BAILEY,	)	HONORABLE
	)	WILLIAM E. PETERSON,
Defendant-Appellant.)	)	PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Plaintiff brought this action for divorce alleging his wife's mental and physical cruelty. Judgment was entered for plaintiff after defendant was denied leave to reopen proofs. On appeal she contends (1) that plaintiff failed to establish his case by a preponderance of the evidence, (2) that the trial court abused its discretion by refusing to permit adult children of the parties to testify, and (3) that it was error to deprive defendant of her interest in a joint business of the parties.

The complaint indicates that the parties had been married 31 years at the time this action was brought. Six children were born of this marriage, all but one of whom was an adult when the case came to trial. At trial plaintiff testified that defendant on June 15, 1967, hit him on the head with a bottle and that on August 11, 1970, she beat him with the heel of a shoe. He stated that he was the sole proprietor of the "S. Bailey Scavenger Service," that defendant exercised no managerial function with regard to the business and that, in fact, she was an "annoyance" in his efforts to operate it in that she failed to inform him of telephone calls from people desiring his service. Defendant was a "very poor housekeeper, [and] didn't prepare meals." She falsely accused him of "running after women" and often instigated fights. He was forced to flee the house to avoid these fights. Despite this provocation, he never struck defendant. These altercations made him nervous and "jittery." After their fights he would sleep either on the living room couch or in his car.



Defendant testified that she had indeed thrown a bottle at plaintiff, but that this incident occurred in 1957, not 1967; that at the time plaintiff was striking one of their children, and that when she attempted to aid the child he threw her to the floor and kicked her, thus breaking her arm. She further testified that the day before this occurrence she discovered that plaintiff had sexual intercourse with another woman in their apartment. Defendant stated that she once hit plaintiff with a shoe but that this occurred in 1955, not 1970, and that she struck him only after he had beaten her to the floor and kicked her. In addition to performing household chores, she took an active role in the operation of the family scavenger business, performing such tasks as answering the telephone, writing checks, starting the truck in sub-zero weather and doing other forms of physical labor. Furthermore, she "put up the first \$1000" toward starting the business.

Judy Bailey, the 14 year old daughter of the parties, was examined by the court. She testified that her parents mistreated each other. Defendant also desired to call one of her older children as a witness; however, the court refused this request.

On the basis of this evidence the court found for plaintiff. In its division of marital property the court held that defendant had no interest in the scavenger business.

Prior to entry of the divorce decree, defendant requested leave of the court to allow two of her adult children to testify on her behalf. The court in denying this request stated, "\* \* \* I do not like children to testify against their parents."<sup>1</sup>

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1. In addition, in her motion for a new trial defendant asserted as grounds therefor that her children, Samuel Bailey, Jr., age 31, and Mrs. Anna Marie Keys, age 23, not allowed to testify at trial, could give evidence with regard to the "lack of grounds for divorce \* \* \*" and "the extent of defendant's work in the family business \* \* \*."





Opinion

In the case at bar no appearance or brief has been filed by plaintiff. Although this fact alone would be sufficient to allow us to summarily reverse the judgment of the trial court, the ends of justice are better served if litigation is determined according to the substantive rights of the parties and not by procedural default. (Logan Furniture Mart, Inc. v. Davis, 8 Ill. App. 3d 150, 289 N.E.2d 228; Vogue Models, Inc. v. Reina, 6 Ill. App. 3d 211, 285 N.E.2d 256; Lynch v. Wolverine Insurance Co., 126 Ill. App.2d 192, 261 N.E.2d 466.) Therefore, we will consider the merits of defendant's appeal.

It is contended that the court below abused its discretion in refusing to allow two of the adult children of the parties to testify. Defendant first attempted to call an adult child as a witness on her behalf immediately upon the completion of her testimony at trial. She raised the issue once more before the entry of judgment in a motion for leave to submit "further evidence." On both occasions the court below, claiming a reluctance to allow children to testify against their parents, rejected defendant's request. We note that the reopening of proofs at the time of entry of a divorce decree is a matter within the discretion of the trial court. (Pantle v. Pantle, 19 Ill. App. 2d 353, 153 N.E.2d 740.) Here the testimony of the parties to this action was, essentially, the only evidence before the court. This evidence was in direct conflict on such crucial matters as the existence of provocation by plaintiff as the cause of defendant's alleged attacks on him and the extent of defendant's participation and interest in the operation of the scavenger business. It appears that these adult offspring of the parties could offer



evidence relevant to the resolution of these issues.<sup>2</sup> Moreover, we can find no statutory disqualification of them as witnesses. (See Ill. Rev. Stat. 1967, ch. 51, par. 1.) It is, therefore, our holding that in refusing to allow Samuel Bailey, Jr., and Anna Marie Keys to testify, the court below abused its discretion. Due to our disposition of this issue, it is unnecessary for us to consider defendant's other contentions.

We therefore reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P.J., and Lorenz, J., concur.

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2. It is to be noted that this evidence, especially with regard to the existence of a partnership between the parties, could be of the utmost importance for, as we have held, the establishment of such a relationship "is a question of intention to be gathered from all the facts and circumstances.\* \* \* The requisites of a partnership are that the parties have joined together to carry on a trade or venture for their common benefit, each contributing 'property or services \* \* \*' Rizzo v. Rizzo, 3 Ill. 2d 291, 299." Kurtz v. Kurtz, 10 Ill. App. 2d 310, 315, 134 N.E.2d 609.

(Abstract only)

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J. H. Davis



59030

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT
vs.	)	COOK COUNTY
	)	
WILLIE MORGAN,	)	HON. MARK E. JONES,
Defendant-Appellant.	)	Presiding

\* PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Willie Morgan, defendant, was found guilty after a bench trial of the offense of aggravated assault in violation of Section 12-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 12-2) and placed on probation for a period of two years.

April Morgan, the wife of the defendant, signed a complaint charging that on January 7, 1973, at 1220 North State Street, Chicago, Illinois, the defendant committed the offense of aggravated assault in that he displayed a handgun and placed said gun between her legs and thereby placed the said April Morgan in reasonable apprehension of receiving a battery. The defendant denied he ever owned or possessed a gun.

The sole issue on appeal is whether the defendant understandingly waived his right to a jury trial.

At trial, the defendant was represented by an assistant Public Defender. When the case was called for trial, the following occurred:

THE CLERK: Willie Morgan; April Morgan.

THE COURT: Mr. Morgan, are you ready for trial?

THE DEFENDANT: I want to see a P. D., or something.





THE COURT: I will appoint the Public Defender.

THE DEFENDANT: I would like to see one.

MR. BERMAN (Assistant State's Attorney): This is an arrest on a warrant. The file is not in court. The charge is aggravated assault.

THE COURT: The lady signed the complaint for the warrant?

MR. BERMAN: Yes. We don't have the complaint; we only have the warrant.

THE COURT: You can make up a duplicate. I appointed the Public Defender.

You may go back. The Public Defender will be back and talk to you.  
Take him back.

(After an interval of time the following proceedings were had:)

THE CLERK: Willie Morgan.

MR. BERMAN: We are ready for trial.

THE COURT: Here is Dr. Kelleher's report. The Public Defender was appointed.

MR. BERMAN: We are ready for trial. There was a pre-trial conference.

THE COURT: Now, Mr. Public Defender, how do you stand?

MR. MOTTA (Assistant Public Defender): Your Honor, Mr. Morgan is ready for trial. The plea is not guilty, and we wish to be tried by this Court.

THE COURT: All right, swear the witnesses.

(Witnesses sworn.)

In People v. Sailor, 43 Ill. 2d 256, 253 N.E.2d 397, the court held that a defendant ordinarily speaks through his attorney and that by permitting his attorney, in his presence and without objection, to waive his right to a jury trial, a defendant is deemed to have acquiesced in and to be bound by his attorney's conduct.



In the case at bar, the defendant seeks to avoid the doctrine as announced in Sailor by arguing that the record does not establish that appointed counsel had ample time to confer with the accused. The transcript discloses that after the trial court appointed the Public Defender he told the defendant "You may go back. The Public Defender will be back and talk to you." The transcript further discloses that after the passage of an interval of time, the assistant State's Attorney informed the trial court that "There was a pre-trial conference." The assistant Public Defender then stated that "Mr. Morgan is ready for trial. The plea is not guilty, and we wish to be tried by this Court."

In People v. Punyko, 9 Ill. App. 3d 1052, 293 N.E.2d 672, the defendant contended that he did not knowingly waive his right to a jury trial. Prior to trial the following occurred:

THE COURT: You wish to waive your right to a trial by jury, submit the cause to trial by this court?

MR. EQUI (defense attorney): That is correct.

This court rejected the defendant's argument, saying (9 Ill. App. 3d, p. 1054):

"We have often held that there is no precise standard to determine if a defendant has made an understanding jury waiver. In People v. Sailor, 43 Ill. 2d 256, 253 N.E.2d 397, our Supreme Court held that a trial court may rely upon the statement of a defendant's attorney where he waives a jury in open court in the presence of the defendant and such waiver is not objected to by the defendant. In People v. Kaprelian, 6 Ill. App. 3d 1066, 286 N.E.2d 613, we held that a jury was knowingly waived where the defendant's attorney, in response to a question by the court, stated that a jury was waived. In the



case at bar, the statement by the privately retained defense attorney was not ambiguous and effectively waived the right to a jury trial."

The rule announced in the Sailor case is applicable to court-appointed counsel. People v. McClinton, 4 Ill. App. 3d 253, 280 N.E.2d 795; People v. Suriwka, 2 Ill. App. 3d 384, 276 N.E.2d 490.

The defendant relies upon the cases of People v. Baker, 126 Ill. App. 2d 1, 262 N.E.2d 7, and People v. Boyd, 5 Ill. App. 3d 980, 284 N.E.2d 699, which were cited and rejected in People v. Taylor, 13 Ill. App. 3d 253, 300 N.E.2d 862. In the Taylor case the court held the defendant waived his right to a jury trial under facts similar to those in the case at bar.

Here, the record discloses that there was a pre-trial conference and it would appear obvious that the assistant Public Defender had conferred with the defendant prior to the case being called and the defendant had agreed to waive a jury trial. Further, defendant's conduct, in permitting his attorney, in his presence and without any objection, to waive his right to a jury trial and enter a plea of not guilty, constitutes a valid jury waiver binding upon the defendant.

The judgment is affirmed.

JUDGMENT AFFIRMED.

\*Mr. Justice Hallett took no part.







NO. 58618

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Respondent-Appellee,	)	COOK COUNTY
	)	
vs.	)	
	)	
BENJAMIN MARSHALL,	)	HONORABLE
	)	ROBERT J. DOWNING,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM:

Benjamin Marshall, also known as Billy Ray Mangum, hereinafter called petitioner, appeals from an order denying, without an evidentiary hearing, his post-conviction and supplemental petitions filed pursuant to the Post-Conviction Hearing Act. (Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq.) The petitioner contends that the allegations in the post-conviction and supplemental petitions, together with his accompanying affidavit, were sufficient to require an evidentiary hearing on the issue of the voluntariness of his guilty pleas to aggravated battery and murder.

On July 16, 1970, the petitioner pled guilty to charges of murder and aggravated battery and was sentenced to not less than 15 years nor more than 40 years on the murder charge and not less than one year nor more than 10 years on the aggravated battery charge, said sentences to run concurrently. On March 16, 1971, the petitioner filed a pro se post-conviction petition and subsequently a supplemental petition in which he contended that he was informed by court-appointed private counsel that, if he pled guilty, "he would be sentenced to terms of not greater than from 3 to 5 years."

The respondent filed a motion to dismiss, stating that the allegations in the post-conviction petition failed to raise any constitutional question within the purview of the Post-Conviction Hearing Act. The respondent attached the report of proceedings of July 16, 1970, the hearing at which the petitioner changed his pleas of not guilty to the murder



and aggravated battery charges to pleas of guilty. Also attached was the supplemental report of proceedings of a hearing on August 24, 1970, containing the stipulation of the parties as to the facts pertaining to the murder and aggravated battery charges, the hearing in aggravation and mitigation, and the sentencing of the petitioner to a term of not less than one year and not more than 10 years on the aggravated battery charge and a term of not less than 15 years and not more than 40 years on the murder charge, said sentences to run concurrently.

The report of proceedings of the hearing on July 16, 1970, discloses that counsel for the petitioner requested a conference and that the petitioner gave his consent thereto. After the conference, the petitioner stated that he wished to withdraw his pleas of not guilty to the murder and aggravated battery charges and to enter pleas of guilty. The court then proceeded to admonish the petitioner as to the legal effect of waiving his right to a jury trial, the nature of the charges, the penalties that may be imposed as to each of the offenses, and the fact that by his pleas of guilty the petitioner waived the right to a trial by jury and the right to be confronted with witnesses against him. In response to interrogation by the trial court, the petitioner stated that he was pleading guilty to each of the indictments and to the charges set forth in those indictments because, in fact, he was guilty of said charges. Thereupon the following discussion took place between the trial court and the petitioner:

THE COURT: You understand that as the result of the conference, the Court has indicated to your attorneys and, as I understand it, that has been communicated to you that the Court under indictment 68-2297, which charges you with murder, would sentence you to a period of not less than fifteen and not more than forty years to run concurrent with the penalty under indictment 68-2298, which charges you with aggravated battery, in which sentence would be one to ten, which would run concurrent with the sentence under the murder charge; do you understand that?



DEFENDANT MARSHALL: Not exactly, not when you made the statement for "not less than fifteen and no more than forty."

THE COURT: That's right; not less than fifteen nor more than forty.

Put it another way. You would be sentenced to the Penitentiary for a term of fifteen to forty years and one to ten, the sentences to be concurrent.

DEFENDANT MARSHALL: Yes, well, I understand that.

THE COURT: All right.

Apart from the possible sentence arising as the result of the conference that have [sic] been held with your attorneys and the State's Attorney and the Court, has any force, threats or any promises been used to compel or induce you to plead guilty to each of these indictments?

DEFENDANT MARSHALL: No.

THE COURT: You understand you have the right to persist in your plea of not guilty or to plead guilty?

DEFENDANT MARSHALL: Yes, I do.

THE COURT: Knowing all these matters about which I have just questioned you, you persist in your plea of guilty to each of the charges in each of these indictments?

DEFENDANT MARSHALL: Right.

THE COURT: All right, let the record show that the defendant, Benjamin Marshall, otherwise called Billy Ray Mangum, having been advised of the consequences of his plea of guilty to each of these indictments and each count in the indictment, and after being so advised, persists in his plea, the plea to each count in each indictment will therefore be accepted.

In the supplemental report of proceedings of the hearing on August 24, 1970, the petitioner, through his counsel, stipulated to the facts pertaining to the aggravated assault on his wife, Mrs. Brenda D. Mangum, on May 6, 1968, at about 2:35 in the afternoon; that the petitioner followed her into a store; that Mrs. Mangum walked out of the store and went to the corner to wait for a bus; that the petitioner followed her out of the store; that an argument ensued and, when the petitioner placed his hands on her, she jerked away from him and began to cross the street; and that she was shot in the





head, falling to the ground and becoming unconscious. It was also stipulated that on May 6, 1968, the petitioner shot and killed his other "wife," Barbara Ann Marshall, at approximately 4:00 P.M., while she was sitting in his automobile. Police Officer John Loftus said the petitioner told him that he, the petitioner, had just shot his wife, Barbara Marshall, who was lying on the front seat of the car. The petitioner was taken to police headquarters, where he told the officers that he had been using the names of Billy Ray Mangum and Benjamin Marshall; that he had married Brenda Mangum in 1966, but their marriage had not been a steady one; that they were separated on and off; and that, about three weeks prior to the shooting, he had married Barbara Marshall.

The petitioner contends that where the allegations in the petition for a post-conviction hearing are undisputed, even though improbable, a hearing is required to determine the truth or falsity of the allegations. He argues that, in his post-conviction petition, he alleged the denial of a constitutional right; that his guilty pleas were induced by misrepresentations of his private court-appointed counsel which rendered his guilty pleas involuntary; and that his allegations were corroborated through his affidavit attached to the original petition and the supplemental petition and, therefore, an evidentiary hearing should have been held.

This contention, however, is without merit because a petitioner is not entitled to an evidentiary hearing on his post-conviction petition as a matter of right, since dismissal of a non-meritorious petition on motion is within the contemplation of the Post-Conviction Hearing Act and is necessary to the orderly and expeditious disposition of such petitions. People v. Collins, 39 Ill. 2d 286, 235 N.E. 2d 570.

In the case at bar, contrary to the unsubstantiated



assertion of the petitioner that he was promised a "3 to 5 year" sentence, the record is clear that the trial court admonished the petitioner as to his constitutional rights and informed him, and petitioner understood, that if he entered pleas of guilty to the charges of aggravated assault and murder the petitioner would receive sentences of not less than 15 years nor more than 40 years on the murder charge and not less than one year nor more than 10 years on the aggravated battery charge, said sentences to run concurrently. Further, the record shows that the petitioner stated his pleas of guilty were not induced by any force, threats or promises.

Although, as a general rule, a motion to dismiss will be considered to accept as true all allegations of fact properly pleaded, nevertheless, when ruling on a motion to dismiss a post-conviction petition, the trial court may render its decision not only upon the allegations, true or untrue, which are contained in the pleadings to which the motion is directed, but also upon the transcript of the trial or other proceedings, such as in the case at bar. People v. Funches, 9 Ill. App. 3d 372, 376, 292 N.E. 2d 187. The report of proceedings of the hearing on July 16, 1970, clearly shows that, at the time petitioner entered his pleas of guilty, he knew he would receive a sentence of not less than 15 years and not more than 40 years on the murder charge and a sentence of not less than one year nor more than 10 years on the aggravated battery charge, said sentences to run concurrently. The post-conviction and supplemental petitions are non-meritorious on their face and, therefore, the trial court properly dismissed the post-conviction and supplemental petitions without an evidentiary hearing. People v. Funches, 9 Ill. App. 3d 372, 376, 292 N.E. 2d 187.



The cases cited by petitioner are not applicable to the facts in the case at bar.

The judgment of the trial court is affirmed.

Judgment affirmed.

Second Division.

Downing, J., did not participate.

Publish abstract only.







No. 58662

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
	)	
vs.	)	
	)	
REAFORD JOHNSON,	)	HONORABLE
	)	EARL E. STRAYHORN,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

On September 1, 1972, the defendant, Reaford Johnson, pleaded guilty to the offense of forgery and was placed on three years probation. (Ill. Rev. Stat. 1971, ch. 38, par. 17-3.) On November 10, 1972, after a hearing on a rule to show cause why probation should not be terminated, probation was terminated and the defendant was sentenced to not less than five nor more than ten years. Defendant contends that he was denied due process at the revocation hearing because hearsay testimony was improperly admitted, because improper questions and answers by the State were allowed and because the conduct of the trial judge was improper.

On October 20, 1972, a petition praying that probation be terminated was filed stating that on September 16, 1972, the defendant entered the Marquette National Bank in Chicago, representing himself to be Gerald Murphy, presented a check for \$222.55, received \$197.55 back in cash and deposited the balance, and was subsequently arrested and charged with the offense of theft by deception.

E. Lois Davis testified for the State: She is a teller at Marquette National Bank and on Saturday, September 16, 1972 the defendant, whom she identified in court, presented a check drawn on that bank and received back \$197. Defendant did not identify himself as Reaford Johnson at this time. He identified himself as the customer whose name appeared on the check. The following Monday the defendant came back and she recognized him. On cross-examination, she testified that the defendant



presented the check and signed it in front of her as she watched, that she checked the file for the name that was on the back of the check and then checked the file to see if the signatures were the same, which they were. She did not recall to whom the check was made out. Defendant was at her window approximately five minutes and was her only customer.

Lawrence Schroeder testified on behalf of the State: He is Assistant Vice President, Marquette National Bank. He identified the defendant in court. The previous Saturday, Mrs. Davis had cashed a check payable to Gerald Murphy and on Monday, when the same gentleman came in, Mrs. Davis called him and said, "That is the gentleman that cashed the bad check." He knew of Gerald Murphy, although he did not know him personally, and on Monday he knew the defendant was not Gerald Murphy, although the defendant had Gerald Murphy's deposit slip. On cross-examination, he testified he did not know who signed the check on Saturday and that on Monday the defendant told him he was Gerald Murphy. He did not have with him in court the checks or the account cards for Gerald Murphy nor was Mr. Murphy present.

Chicago Police Officer Francis McVey testified: At approximately 2:45 on September 18, 1972, he went to the Marquette National Bank where the defendant was being held because a teller recognized him as the man who on Saturday came in with "a bogus check" and received approximately \$197 in cash and \$25 to be deposited to the account of Gerald Murphy. Defendant was advised of his rights and made no statement to him.

Defendant, Reaford Johnson, testified in his own behalf: On Monday, September 18, 1972, he was in the bank with his friend, William Turner, who had asked him to "check this thing out for him." He went over to the window and asked for a balance check and that was all. He was not in the bank on any other occasion to deposit any money and had not seen Mrs. Davis



at any time and did not sign the name "Gerald Murphy" to any check. On cross-examination, he testified he had known William Turner about six months, Turner just gave him a slip, without a name, said he had to take care of some transactions and was in a hurry.

At the conclusion of the defendant's testimony, the following colloquy took place:

MR. GOLDBERG (Assistant State's Attorney):  
I have nothing further.

MR. JACOBS (Assistant Public Defender):  
Nothing further.

THE COURT: When I put you on probation, Mr. Johnson, August 31st of this year, one of the conditions of my probation was that you were to proceed immediately upon your release to the Oak Park section of the Illinois Drug Abuse Program. Did you proceed and register in that program at that agency?

A. Yes, sir.

THE COURT: You are a liar because the agency notified me you never showed up.

A. No, I was there, I have been there.

THE COURT: Then they are liars. All right.

A. I showed up and I was waiting --

THE COURT: Do you have anything else, Mr. Jacobs?

MR. JACOBS: Yes, Judge, if I might state for the record that I have now found in my file the rule, however, the reason I did not observe it at first, until I saw the State's copy, is because it was a petition made by the State's Attorney.

DEFENDANT JOHNSON: May I make a statement?

THE COURT: Yes, you may make a statement in mitigation because based on what I have heard, I'm revoking and terminating your probation. We will now proceed in a hearing -- do you have anything else, Mr. Jacobs, before I enter the formal order? Do you have anything else on the Rule?

Officer McVey was then recalled and testified that he had done a check on Mr. Turner, who was arrested for an incident that occurred on the same day in the same bank on another account, not Mr. Murphy's account. In the past, Turner had





been convicted of more than one felony. Turner was not shown to Mrs. Davis, to his knowledge, but Mr. Schroeder did identify Turner.

Defendant first maintains that he did not receive a fair hearing because the judge was "prejudiced" against him. As proof of this contention, he points to unfavorable rulings of the judge on evidentiary matters and to the remark of the court that defendant was a "liar." In People v. Vine (1972), 7 Ill. App. 3d 515, 516, 288 N.E. 2d 69, cited by the defendant, the trial judge, prior to his finding of guilt, indicated he would "take into consideration the Court's file" and the jury verdict in another case. In reversing, the reviewing court noted that the trial judge is limited to the record before him and that "it is a violation of due process to consider matters without that record." Here, however, the hearing had come to an end and both the prosecution and defense had stated they had "nothing further." The judge was inquiring about another possible violation of the terms of probation. Although the remark was injudicious, it does not follow that the court was thereby prejudiced or that he considered whether the defendant had in fact appeared for the appointment in revoking his probation. Apart from whether the defendant appeared for his appointment, there was sufficient evidence that he had otherwise violated the terms of his probation. As in other cases tried by the court without a jury, the judgment will not be reversed on the ground of admission of immaterial or incompetent evidence if sufficient, proper evidence was admitted to sustain the finding. People v. Crowell (1971), 1 Ill. App. 3d 868, 870-871, 276 N.E. 2d 508.

Defendant argues that he was not proven guilty by a preponderance of competent evidence of any conduct which would subject him to a revocation of his probation. He points to the admission of hearsay testimony and the fact that no real



evidence was produced, such as the check itself or the deposit slips. According to the petition, the defendant committed the offense of theft by deception. Ill. Rev. Stat. 1971, ch. 38, par. 16-1(b) provides that when a person knowingly obtains by deception control over property of the owner, he commits theft. See, for example, People v. Jones (1972), 4 Ill. App. 3d 927, 282 N.E. 2d 283, where probation was revoked under similar circumstances.

The testimony of the bank teller was sufficient to show by a preponderance of the evidence that defendant had committed the offense. The teller identified the defendant in court as the man who, on Saturday, September 16, 1972, presented a check which she cashed, giving the defendant back \$197. Her testimony established that the defendant did not reveal his true identity, but identified himself, instead, as a customer of the bank, the customer whose name was on the check being cashed. This testimony, if believed, was sufficient to show by a preponderance of the evidence that defendant had committed the offense of theft by deception and, consequently, violated the terms of his probation. Although the teller could not recall specifically the name of the other customer, and although the check itself was not admitted, and although hearsay evidence was also admitted, sufficient competent evidence was introduced. The teller's identification of the defendant raised a question of credibility which was for the trier of fact to determine. A finding of a violation of probation will not be disturbed "simply because of a conflict in evidence", but only when the testimony is contrary to the manifest weight of the evidence. People v. Crowell (1973), 53 Ill. 2d 447, 452, 292 N.E. 2d 721. It is not here.

Finally, defendant contends, correctly, that the sentence imposed contravenes the provisions of the Unified Code of Corrections. Forgery is now a Class 3 felony. (Ill.



Rev. Stat., 1972 Supp., ch. 38, par. 17-3.) The minimum sentence for a Class 3 felony may not exceed one-third of the maximum term set by the court (here, a term of ten years). (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-8-1(c)(4).) Accordingly, the minimum sentence is reduced to three years and four months and the judgment of the circuit court of Cook County, as modified, is affirmed.

Judgment affirmed as modified.

SECOND DIVISION; Hayes, P.J. did not participate.

Publish abstract only.

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PEOPLE OF THE STATE )  
OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
JOHN WARREN, )  
 )  
Defendant-Appellant. )

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

HONORABLE  
ARTHUR V. ZELEZINSKI,  
Presiding.

PER CURIAM:

Defendant, John Warren, after a bench trial, was convicted of possession of a controlled substance in violation of Ill. Rev. Stat. 1971, ch. 56½, par. 1402, and sentenced to a term of nine months in the House of Correction. On appeal he argues that the trial court should have granted his pretrial motion to suppress the physical evidence.

The testimony of Chicago Police Officer James O'Quinn established that on July 17, 1972, at about 1:00 p.m., he was in uniform with his partner inside an abandoned store at 2230 West Madison Street, in Chicago, an area he described as a "shooting gallery," one frequented by narcotic addicts which the police "check out" frequently. Although he had no information regarding the defendant specifically he went there to conduct a surveillance of the street scene and observed the defendant in front of the store. Other persons known to him as addicts were in the area standing near the defendant. He saw a male Negro [a man he did not know, but whom he had previously seen loitering in the area] approach the defendant and talk with him. The man handed the defendant what appeared to be money, although the officer could not tell how much. The defendant then reached up underneath his shirt, on the top part of his shoulder, and took out a clear plastic bag. He then removed a "tin foil packet" from the bag and gave the packet to the man. The officer, having made these observations, came out of the store, went up to the defendant, and immediately put his hand inside defendant's shirt



and removed the clear plastic bag. He testified that in the seven years he has been a Chicago Police officer he has seen such tinfoil packets many times, and that in his experience, most of them contained heroin.

When the motion to suppress was denied, the parties stipulated that the evidence adduced on the motion to suppress be admitted in the case-in-chief, and the officer testified that having retrieved the clear plastic bag he found it to contain five tinfoil packets which, according to the crime lab analysis, contained 2.3 grams of heroin. He also identified the defendant in court.

A search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. United States v. Robinson (1973), \_\_\_\_ U.S. \_\_\_\_, 42 U.S.L.W. 4055. See also, Ill.Rev.Stat. 1971, ch. 38, par. 108-1. The validity of an arrest without an arrest warrant depends upon whether the arresting officers have reasonable cause to believe that an offense has been committed and that the defendant committed it. The test is said to be not whether there is sufficient evidence to convict the arrested person, but whether there is probable cause for arrest; that is, "where a reasonable and prudent man, having the knowledge possessed by the officer at the time of the arrest, would believe the defendant committed the offense." People v. Jones (1964), 31 Ill.2d 240, 243-244, 201 N.E. 2d 402.

In the instant case the arresting officer had probable cause to believe that a sale of narcotics had taken place before his eyes and that the defendant was in possession of narcotics. The area was one frequented by narcotic addicts, one he described as a "shooting gallery" that the police often checked out. Other known narcotic addicts were present in the area at the time. In broad daylight the officer observed a man



who had been loitering approach the defendant. After a conversation the man gave the defendant money and the defendant gave him a tinfoil packet which he took from a clear plastic bag secreted under his clothing. The officer's years of experience on the Chicago Police force enabled him to recognize the tinfoil packet as one commonly used as a container for narcotics.

These circumstances warranted a reasonable and prudent man's believing that a crime was being committed. Tinfoil packets have been involved in many cases, such as People v. Owens (1969), 41 Ill. 2d 465, 467, 244 N. E. 2d 188, where the court recognized a tinfoil packet as a common container for narcotics. See also People v. Berry (1959), 17 Ill. 2d 247, 251, 151 N. E. 2d 315, upholding the seizure of policy tickets observed by a police officer in the defendant's automobile. The facts known to the officer thus established probable cause to believe that an offense was being committed and had been committed in his presence. This justified the officer's making an arrest without an arrest warrant. The search was justified incident to this lawful arrest, and the result of that search was properly admitted into evidence.

Defendant claims, however, that the search preceded the arrest so that the search cannot be justified as "incident" to the arrest, citing People v. Cox (1971), 49 Ill.2d 245, 274 N.E. 2d 45. Cox, however, involved a premises search incident to an invalid search warrant [subsequently quashed], which resulted in the discovery of marijuana and defendant's subsequent arrest for possession of that marijuana. The Supreme Court held that the search could not be justified as incident to the arrest because the record showed the purpose of the officers in entering defendant's residence was to search and not to arrest the defendant. Hence, Cox is clearly distinguishable. Closer in





point is People v. Clark (1956), 9 Ill. 2d 400, 137 N.E. 2d 820, where the court pointed out that no "formal declaration of arrest" was necessary for a valid arrest to have been made at the time when police officers seized contraband [policy tickets] from the defendant. Here the officer sized up the situation as a sale of heroin and moved quickly to seize the material he reasonably believed to be contraband before the defendant could otherwise dispose of it. It was not necessary for him to announce his office or make a formal declaration of his obvious purpose to arrest the defendant and take control of the contraband. Officer O'Quinn had the authority to arrest the defendant and he exercised that authority when he restrained the defendant's person and removed the contraband. See People v. Howlett (1971), 1 Ill.App. 3d 906, 909-910, 274 N. E. 2d 885. Since an arrest was in fact made at the time of the seizure, the contention that the search came before the arrest is without merit. The search was incident to the arrest.

The motion to suppress was properly denied and the defendant was proved guilty beyond a reasonable doubt. Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

THIRD DIVISION.

Justice McNamara did not participate.





59037

PEOPLE OF THE STATE	)	APPEAL FROM
OF ILLINOIS,	)	CIRCUIT COURT
	)	COOK COUNTY
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
JOHN WARREN,	)	HONORABLE
	)	ARTHUR V. ZELEZINSKI,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Defendant, John Warren, after a bench trial, was convicted of possession of a controlled substance in violation of Ill. Rev. Stat. 1971, ch. 56½, par. 1402, and sentenced to a term of nine months in the House of Correction. On appeal he argues that the trial court should have granted his pretrial motion to suppress the physical evidence.

The testimony of Chicago Police Officer James O'Quinn established that on July 17, 1972, at about 1:00 p.m., he was in uniform with his partner inside an abandoned store at 2230 West Madison Street, in Chicago, an area he described as a "shooting gallery," one frequented by narcotic addicts which the police "check out" frequently. Although he had no information regarding the defendant specifically he went there to conduct a surveillance of the street scene and observed the defendant in front of the store. Other persons known to him as addicts were in the area standing near the defendant. He saw a male Negro [a man he did not know, but whom he had previously seen loitering in the area] approach the defendant and talk with him. The man handed the defendant what appeared to be money, although the officer could not tell how much. The defendant then reached up underneath his shirt, on the top part of his shoulder, and took out a clear plastic bag. He then removed a "tin foil packet" from the bag and gave the packet to the man. The officer, having made these observations, came out of the store, went up to the defendant, and immediately put his hand inside defendant's shirt



and removed the clear plastic bag. He testified that in the seven years he has been a Chicago Police officer he has seen such tinfoil packets many times, and that in his experience, most of them contained heroin.

When the motion to suppress was denied, the parties stipulated that the evidence adduced on the motion to suppress be admitted in the case-in-chief, and the officer testified that having retrieved the clear plastic bag he found it to contain five tinfoil packets which, according to the crime lab analysis, contained 2.3 grams of heroin. He also identified the defendant in court.

A search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. United States v. Robinson (1973), \_\_\_ U.S. \_\_\_, 42 U.S.L.W. 4055. See also, Ill.Rev.Stat. 1971, ch. 38, par. 108-1. The validity of an arrest without an arrest warrant depends upon whether the arresting officers have reasonable cause to believe that an offense has been committed and that the defendant committed it. The test is said to be not whether there is sufficient evidence to convict the arrested person, but whether there is probable cause for arrest; that is, "where a reasonable and prudent man, having the knowledge possessed by the officer at the time of the arrest, would believe the defendant committed the offense." People v. Jones (1964), 31 Ill.2d 240, 243-244, 201 N.E. 2d 402.

In the instant case the arresting officer had probable cause to believe that a sale of narcotics had taken place before his eyes and that the defendant was in possession of narcotics. The area was one frequented by narcotic addicts, one he described as a "shooting gallery" that the police often checked out. Other known narcotic addicts were present in the area at the time. In broad daylight the officer observed a man





who had been loitering approach the defendant. After a conversation the man gave the defendant money and the defendant gave him a tinfoil packet which he took from a clear plastic bag secreted under his clothing. The officer's years of experience on the Chicago Police force enabled him to recognize the tinfoil packet as one commonly used as a container for narcotics.

These circumstances warranted a reasonable and prudent man's believing that a crime was being committed. Tinfoil packets have been involved in many cases, such as People v. Owens (1969), 41 Ill. 2d 465, 467, 244 N. E. 2d 188, where the court recognized a tinfoil packet as a common container for narcotics. See also People v. Berry (1959), 17 Ill. 2d. 247, 251, 151 N. E. 2d 315, upholding the seizure of policy tickets observed by a police officer in the defendant's automobile. The facts known to the officer thus established probable cause to believe that an offense was being committed and had been committed in his presence. This justified the officer's making an arrest without an arrest warrant. The search was justified incident to this lawful arrest, and the result of that search was properly admitted into evidence.

Defendant claims, however, that the search preceded the arrest so that the search cannot be justified as "incident" to the arrest, citing People v. Cox (1971), 49 Ill.2d 245, 274 N.E. 2d 45. Cox, however, involved a premises search incident to an invalid search warrant [subsequently quashed], which resulted in the discovery of marijuana and defendant's subsequent arrest for possession of that marijuana. The Supreme Court held that the search could not be justified as incident to the arrest because the record showed the purpose of the officers in entering defendant's residence was to search and not to arrest the defendant. Hence, Cox is clearly distinguishable. Closer in



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No. 59207

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
JON D. SIEG,	)	HONORABLE
	)	JOHN GANNON,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Defendant, Jon D. Sieg, was charged with attempt to obtain or acquire possession unlawfully of a controlled substance by misrepresentation, fraud, forgery or subterfuge (a forged prescription) contrary to the provisions of the Illinois Controlled Substances Act (Ill.Rev.Stat. 1971, ch. 56-1/2, par.1406(b)(3).) After a bench trial, he was found guilty and sentenced to the Cook County Department of Corrections for a term of 30 days. He appeals, contending that he was not proved guilty beyond a reasonable doubt.

Fred Tanenbaum is a registered pharmacist at Kare Drugs, 1155 Lee Street, DesPlaines. In the afternoon of June 12, 1972, a man and a young lady came in the store and presented him a prescription for a drug of the barbiturate family. Not knowing either of the customers, he looked at the prescription and became suspicious. It was not properly signed. He contacted the physician on the phone. [Defendant's counsel stipulated that the prescription was forged.]

Mr. Tanenbaum called the police. When the two people saw him reaching for the phone a second time, they ran out of the store. He followed them out of the store and observed where they went until he lost sight of them. He noticed a parked black car about where they were headed and that the car had an out of the area city sticker.



He described the two people to the police: The man was wearing a three-quarter length black leather jacket. He had on dark slacks and black rimmed sunglasses.

A detective asked him to come out and see if he could identify a suspect and he identified the woman as the same woman he had seen earlier. The second time he saw the woman, she had changed her hair style. At one time it was tied up; she had loosened it. She had got rid of her purse and her jacket. Subsequently, the detective came in with the defendant's leather jacket and the woman's purse and coat. They had been found in a garbage can to the rear of a building they had run behind.

At the trial on May 3, 1973, Mr. Tanenbaum identified the defendant as the man who came into the store on June 12, 1972. He had not seen him since then. He was absolutely sure that the defendant in court is the same man that presented him with the prescription.

At the trial Mr. Tanenbaum testified that the man's hair was longer then it is in court, past his collar. He didn't notice whether his hair was then the same color as it is at the trial. He didn't recall whether he had a mustache or not; he may have. He noticed a scar on his lip. As he recalls, the young lady was wearing the same thing she is wearing in court.

Robert~~a~~ Rosewinkel testified for the defense that on June 12, 1972, she was in the Kare Drug Store with a man who was not the defendant. She doesn't know this man's last name, but he is from the area where she lives. The people know him as "Junkie" or Earl. She has known him about a year, two years. She had the prescription. She did not present it to the pharmacist. The other person did. When he saw the





pharmacist making a phone call, he grabbed her by the arm and said "Run". So she ran because she knew a little bit about the person's background, but she wasn't real good friends with him. He had on a black corduroy jacket and wore prescription sunglasses. She doesn't remember the clothes he was wearing, other than the jacket. He had a mustache.

She has known the defendant Sieg for two years. She dates him; they are engaged, but there is no formal announcement yet. She wouldn't do anything to hurt him. She would not lie for him. He did not request her to come to court today. She offered to come because she didn't think it is fair that he should be punished for something he had nothing to do with. It was actually her fault. She was in the wrong, and she shouldn't have incriminated him because she had his car. She incriminated him by using his car in association with a crime. She drives his car all the time.

Defendant, Jon Sieg, testified that on June 12, 1972, his hair was maybe an inch and a half longer than it is in court. It never hung down to his shoulders; maybe to the bottom of his ears, but never shoulder length. He didn't always wear a mustache as he does now. He was wearing one on that day; he has worn a mustache for the last 4 years. He does not own a pair of prescription sunglasses. He wears contacts. He has them on now. In the summer of 1972 he had worn dark glasses. He could have been wearing dark glasses on June 12th; he honestly doesn't recall. On June 12, 1972, he was not in the Kare Drug Store. He has never even been in DesPlaines. He has never seen pharmacist Tanenbaum before the trial. He did not present him with the prescription which is the subject matter of this prosecution. He owned a '61 Chevrolet on June 12, 1972. His fiancée, Roberta Rosewinkel,



had the car on that day. She had it that evening and the next day.

The court found the defendant guilty and, after a hearing in aggravation and mitigation during which defendant's counsel stated that the defendant was a narcotics addict, sentenced him to 30 days in the Cook County Department of Corrections. Then, addressing the pharmacist, Mr. Tanenbaum, he said: "I want you to know that I believe your testimony and my conviction is based on your testimony".

In support of his contention that he was not proved guilty beyond a reasonable doubt, defendant first argues that the in-court identification by the pharmacist was insufficient to establish beyond a reasonable doubt that it was the defendant who committed the offense.

Defendant claims that the identification was insufficient because 1) the pharmacist had never seen the defendant before the time of the offense and then not again until the trial, almost 11 months later, 2) he was unable to fix the features of the offender, 3) he testified to differences in the appearance of the offender as compared to the defendant in court, and 4) he failed to testify to any similarities between the two. Defendant also argues that the fact that the trial court stated he did not believe the defendant and his witness, both of whom denied that defendant was the one who committed the offense, cannot substitute as evidence of defendant's guilt.

The identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness is credible, even though it may be contradicted by the defendant. People v. Stringer, 52 Ill.2d 564, 289 N.E.2d 631.



This case depends solely on the credibility of the pharmacist and the defendant and his witness. The pharmacist in court positively identified defendant as the man who had presented the forged prescription to him and the trial judge explicitly stated that his finding of guilty was based on this testimony. In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unreasonable, improbable and unsatisfactory as to leave a reasonable doubt of the defendant's guilt will the finding of the trial judge be disturbed. People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378.

Here, the trial judge chose to believe the testimony of the State's witness. After an examination of the record, we cannot say that determination was erroneous.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Mejda did not participate.







59258

PEOPLE OF THE STATE )  
 OF ILLINOIS, )  
 Respondent-Appellee, )  
 v. )  
 NATHANIEL DANIELS, )  
 Petitioner-Appellant. )

APPEAL FROM  
 CIRCUIT COURT  
 COOK COUNTY

HONORABLE  
 FRANK J. WILSON,  
 Presiding.

PER CURIAM:

Nathaniel Daniels, petitioner, entered a plea of guilty on June 17, 1970, to the offenses of armed robbery, attempted armed robbery, and attempted murder, and was sentenced to a term of two to eight years. No appeal was taken from those judgments of conviction. A subsequent pro se petition filed pursuant to the Illinois Post-Conviction Hearing Act was amended by appointed counsel and the petition was dismissed on motion of respondent without an evidentiary hearing. [Ill. Rev. Stat. 1971, ch. 38, par. 122-1.] Petitioner appeals.

The amended post-conviction petition alleged a violation of petitioner's constitutional rights in that he was not admonished by the trial court at the June 1970 change of plea hearing as to his right against self-incrimination, his right to confront his accusers, and the maximum sentence which could be imposed upon his plea of guilty, all as allegedly required by Supreme Court Rule 402. [50 Ill. 2d R. 402.] Petitioner here contends solely that the trial court erred in dismissing the petition since the record from the change of plea failed to disclose that he was sufficiently admonished as to the maximum term which could be imposed upon a plea of guilty to the offense of armed robbery, and that, in any event, the record failed to disclose that he understood the admonishment when given by the court.



The record taken at the change of plea discloses that petitioner and his codefendant [not involved in these post-conviction proceedings] were admonished that they could be sentenced to terms of one to fourteen years on the charge of attempted armed robbery, of one to twenty years on the charge of attempted murder, and of "not less than two years minimum, all the way up, indeterminate" on the armed robbery charge. That record further discloses that after the court so admonished the petitioner and his codefendant the court stated, "Do you understand that [codefendant], Brown?" and Brown answered in the affirmative.

Supreme Court Rule 402 was not, per se, applicable to pleas of guilty at the time petitioner entered the plea here in question. [See 50 Ill. 2d R. 402.] Pleas of guilty were governed by the procedures contained in section 115-2 of the Code of Criminal Procedure, in Supreme Court Rule 401(b), and in the case of Boykin v. Alabama, 395 U.S. 238. [See Ill.Rev.Stat. 1969, ch. 38, par. 115-2; 36 Ill. 2d R. 401; see also People v. Reeves, 50 Ill. 2d 28, 276 N. E. 2d 318, holding that the requirements expressed in Boykin had theretofore been a part of Illinois law.]

The requirements established by the foregoing case and statutory law and Supreme Court rule were essentially that the accused enter the plea of guilty in open court; that the trial court advise him of the consequences of that plea, of the maximum term of imprisonment to which he could be sentenced upon such plea, and of the nature of the charges against him; and that the record affirmatively disclose that such plea was voluntarily and understandingly entered. In arriving at a determination of whether an accused had possessed the requisite depth of knowledge to have understandingly and



voluntarily entered the plea, the entire record taken at the change of plea hearing will be considered in a practical and realistic manner. People v. Williams, 133 Ill.App. 2d 214, 272 N.E. 2d 775.

Petitioner argues that the admonishment as to the maximum term which could be imposed was not sufficient since that term was stated by the court to be "indeterminate," citing People v. Terry, 44 Ill.2d 38, 253 N.E. 2d 383. However, the instant admonishment did not state the maximum term solely as "indeterminate," but rather as "not less than two years, all the way up, indeterminate." In People v. Gaines, 48 Ill.2d 191, 268 N.E.2d 426, the Supreme Court upheld as sufficient the admonishment that the accused could be sentenced to "an indeterminate term in the Illinois State Penitentiary for any number of years, and the court can fix the minimum and maximum terms of such sentence." [The Supreme Court in Gaines also specifically noted that the Terry case was not applicable.] The admonishment given in the instant case is substantially the same as that upheld in the Gaines case and advised the petitioner herein that he could be sentenced to a minimum term of two years and a maximum term of any number of years above that. The admonishment was sufficient.

The record taken at the change of plea in the instant case discloses that petitioner knowingly and intelligently responded to questioning by the court as to the nature of the charges against him, his right to a jury trial, the results of the plea bargaining negotiations, and whether he desired to appeal the judgment. Like responses were also given to questions asked of him by his own counsel concerning





the entry of the plea and the right of representation by counsel if petitioner wished to persist in his plea of not guilty. Considered in a realistic and common-sense manner the record taken at the change of plea discloses that petitioner knowingly and voluntarily entered the plea of guilty. People v. Williams, supra. The trial court properly dismissed the post-conviction petition without an evidentiary hearing.

For these reasons the judgment of the circuit court of Cook County dismissing the post-conviction petition is affirmed.

Judgment affirmed.

THIRD DIVISION.

Justice McNamara did not participate.





59177

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
CHARLES BERNARD DAHL,	)	HON. LOUIS B. GARIPPO,
	)	Presiding.
Defendant-Appellant.	)	

\*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Charles Bernard Dahl, defendant, was found guilty after a bench trial of the crime of indecent liberties with a child in violation of section 11-4 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 11-4.) He was sentenced to a term of four years to four years and one day. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, Roxann Fabecich, age 9, testified that at approximately 6:00 A. M. on August 13, 1972, defendant, whom she had seen previously on two occasions, entered her bedroom, put a knife to her throat and forced her to perform an act of oral copulation. She testified that during the incident she got a funny taste in her mouth which caused her to vomit on the bed. After the defendant left, she immediately reported the incident to her brother, who was sleeping in the next room. Michael Fabecich, the complainant's brother, testified that on August 13, 1972, at about 6:00 A. M., Roxann woke him up, stating that Charles had raped her. A laboratory analysis of the sheet from Miss Fabecich's bed revealed the presence of vomit.

In reviewing a conviction for a sex offense, a reviewing court is charged with a special duty to exercise the utmost caution and circumspection in scrutinizing the sum and substance

\*Mr. Justice Burke did not participate.



of the evidence upon which the conviction is predicated.

(People v. Pointer, 6 Ill. App. 3d 113, 285 N.E.2d 171.) However, it is still the function of the trier of fact to determine the credibility of witnesses and otherwise assess the weight of evidence presented at trial. (People v. Springs, 51 Ill. 2d 418, 283 N.E.2d 225.) The testimony of the prosecutrix alone, if convincing, is sufficient to sustain a conviction even if denied by the accused and not corroborated. People v. Halteman, 10 Ill. 2d 74, 139 N.E.2d 286.

After a complete review of the entire record, we find that the evidence submitted by the State was sufficient to establish defendant's guilt beyond a reasonable doubt, even though it was contradicted by the defendant and his alibi witnesses. The trial judge is not obliged to believe the defendant's alibi testimony. (People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462.) No error of law exists in this record and a full opinion would have no precedential value. The evidence established defendant's guilt beyond a reasonable doubt. The judgment of conviction is accordingly affirmed.

This opinion is filed and the cause disposed of in accordance with Supreme Court Rule 23. Ill. Rev. Stat. 1972 Supp., ch. 110A, par. 23.

Judgment affirmed.

(Abstract Only).







No. 58087

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	
	)	COURT OF COOK COUNTY.
vs.	)	
	)	HONORABLE
CHARLES DOSS, JR.,	)	THOMAS R. CASEY,
	)	PRESIDING.
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

After a bench trial in the circuit court of Cook County, defendant, Charles Doss, Jr., was found guilty of petty theft and sentenced to four months in jail. He appeals, contending that he did not knowingly and understandingly waive his right to a trial by jury, and that the trial court abused its discretion in refusing to allow him to withdraw the jury waiver.

Defendant was originally charged with burglary, criminal trespass to a vehicle, and grand theft of an automobile. On March 3, 1972, when the case was called, the prosecutor and defendant's privately retained counsel informed the court that they had conferred and entered into the following stipulation: the State would reduce the burglary charge to petty theft; the defense would stipulate to the testimony of the complaining witness; and defendant would be granted a continuance to work out some arrangement with regard to other pending prosecutions. The prosecutor dropped the burglary charge, and was allowed to file a complaint charging petty theft. The defense waived reswearing, and the following colloquy ensued:

THE COURT: Does he wish to be tried by this court or by a jury?

DEFENSE COUNSEL: At the present time, your Honor, we will indicate, your Honor, by this court.

THE COURT: Plea not guilty, jury waived.

Defense counsel interposed no objection to this statement by the judge. The assistant State's Attorney then attempted to recite a stipulation not only as to ownership of the stolen



property, but also as to defendant's knowing entry into a vehicle without the owner's consent and the taking of a radio. Defense counsel announced that he was not stipulating to the facts set forth in the complaint, but did state that he was stipulating that on February 17, 1972, Mel Ranson was the owner of the vehicle and radio in question, that it was parked in a garage in downtown Chicago, and that Ranson did not give permission to defendant or anyone else to enter or possess the vehicle or radio. The trial court, commenting that trial had begun, continued the cause to March 14, 1972. The State "SOL-ed" the charges of criminal trespass and grand theft of another automobile.

On March 14, 1972, the prosecutor informed the trial court that defendant had pleaded guilty to a felony charge in another branch of the court, and that the State would have no objection to a sixty day sentence on the present charge to run concurrently with the sentence imposed on the felony. Defense counsel, joining in the request, informed the court that defendant had received a sentence of two years. The trial judge stated that he could not agree with the suggested sentence. After a brief recess, defense counsel requested a jury trial, mistrial, and a substitution of judges. The trial judge, stating that trial had begun, denied all the motions.

Although Ranson's testimony had been introduced previously by stipulation, the State elected to have him again testify that he was the lessee of an automobile and radio and had not given defendant permission to enter the vehicle or take the radio. A police officer testified that he had observed defendant enter the automobile by use of a coat hanger, and had seen him emerge from the automobile with some possessions, including a radio. After the State presented its evidence, defendant was given a continuance until March 29 to present a defense.



On March 29, defendant rested without presenting evidence. The court found him guilty, and, after a hearing in aggravation and mitigation, imposed the sentence of four months in jail.

Defendant's first contention is that he did not knowingly and intelligently waive his right to a jury trial. A defendant who, as here, permits his attorney, in his presence and without objection, to waive his right to a jury trial is deemed to have acquiesced in, and to be bound by, his attorney's action.

(People v. Sailor (1969), 43 Ill.2d 256, 253 N.E.2d 397.)

Defendant contends, however, that his jury waiver was conditionally given in exchange for continuing negotiations of all the criminal matters pending against him, and also in contemplation of a guilty plea. These assertions do not appear to answer the fundamental fact that defendant knowingly and intelligently waived his right to a jury when he stood silently by and thus acquiesced in his attorney's announced jury waiver. Moreover, when the trial judge announced that the jury had been waived and instructed the parties to proceed, it was defense counsel who corrected the prosecutor as to the extent of the stipulation and recited into the record the stipulated testimony of the owner of the stolen merchandise. In proceeding to trial in such a fashion, defense counsel gave no suggestion that the jury waiver was qualified or conditional. Defense counsel also gave no indication of an eventual guilty plea when he specifically limited the stipulation to ownership at the time and place of the theft. Further, in light of the announced and immediate commencement of trial, defense counsel's use of the phrase "at the present time" cannot be viewed as a qualification of the jury waiver. We believe that the Sailor holding is applicable to the present case, and defendant, through his privately retained counsel, knowingly and intelligently waived his right to a jury trial.





Defendant's next contention is that the trial court abused its discretion in refusing to allow defendant to withdraw his jury waiver on March 14, 1972. After the trial judge refused to concur in the proposed disposition agreed to by the defense and State, defense counsel moved to withdraw defendant's jury waiver. The trial court indicated that he could not permit a jury demand after trial had commenced. Defense counsel agreed that trial had commenced on March 3, but stated that he believed there would be an eventual plea of guilty.

In People v. Catalano (1963), 29 Ill.2d 197, 193 N.E.2d 797, cert. den. 1964, 377 U.S. 904, after defendant had entered into a stipulation with regard to the testimony of the ownership of the vehicles in question, the cause was continued. Prior to the continuance defense counsel stated that it would be a bench trial, and also moved for a presentence investigation. On trial date, defense counsel approached the trial judge in chambers to discuss the disposition the court intended to make if there would be a finding of guilty. After learning the attitude of the judge, defense counsel made a motion for a change of venue and then to withdraw the jury waiver. The trial court denied both motions and subsequently found defendant guilty. In affirming the judgment, the Supreme Court stated at p.202:

While a defendant has the right to a trial by jury, once he has voluntarily elected to waive that right he cannot thereafter withdraw his waiver as a matter of right. Whether the accused will be permitted to withdraw the waiver is ordinarily within the discretion of the trial court unless the circumstances indicate that the defendant did not realize the consequences of his jury waiver.

\*\*\*

And further on p.203:

\*\*\*[T]he authorities are uniform to the effect that a motion for withdrawal of waiver made after the commencement of the trial is not timely and should not be allowed. There is considerable discussion in the present case as to whether or not the trial had already "commenced" by the defendant's stipulation to the testimony of the two owners of the automobiles.



The court went on to hold that even if the motion to withdraw the jury waiver, despite the stipulation as to ownership, were considered to have been made prior to the commencement of trial, the trial court did not err in denying the motion. In the present case, the facts are stronger because the trial court specifically found, and defense counsel agreed, that trial had commenced prior to the attempted withdrawal of the jury waiver. We conclude that the trial court's refusal to allow defendant to withdraw his jury waiver because the court did not concur in the plea agreement made with the State did not constitute an abuse of discretion.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

DEMPSEY and MCGLOON, JJ., concur.





58997

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	
	)	Court of Cook County.
v.	)	
	)	
JAMES J. NAUJOKAS, JR.,	)	Honorable Paul F. Gerrity,
	)	Judge Presiding.
Defendant-Appellant.	)	

PER CURIAM:

James J. Naujokas, Jr., defendant, was charged with the unlawful use of a weapon in violation of Section 24-1(a)(4) of the Criminal Code and also of failing to possess a State Firearm Owner's Identification Card, in violation of Section 83-2 of the Criminal Code (Ill.Rev.Stat., 1971, ch. 38, pars. 24-1(a)(4), 83-2). After a bench trial, the defendant was found guilty of both charges and sentenced to serve one year in the House of Correction on each of said charges, said sentences to run concurrently.

The sole issue on appeal is whether the trial court erred in denying defendant's motion to suppress the evidence.

At the hearing to suppress the evidence, Police Officer Cunningham testified that on July 15, 1972, at about 2:15 in the morning, the automobile in which he and his partner were riding was stopped for a red light at Wallace and 31st Street, Chicago, when they noticed a car make a left-hand turn off of 31st Street and park in front of a restaurant at approximately 3055 S. Wallace, Chicago. Two men, who were later identified as the defendant and his brother Michael, left the car and instead of entering the building or the





restaurant they went into the alley. The police officers turned their automobile into the alley but could not see anyone. There is a school on the north side of the alley and a Del Farm food store on 31st Street. When the police officers could not find anyone in any of the buildings, they drove around the block. When they returned they saw the men coming from the alley. Cunningham said the reason they were following the men was because "the Del Farm had been known to be burglarized and there isn't an alarm on the building, two people are walking in an alley at approximately 2:15 in the morning it gave us reason enough to go and find out just exactly why were people walking in the alley at 2:15." At the time there were no other people on the street other than the two men. The police officers stopped the men for identification. The defendant, who was trying to start the car, did not have a driver's license. Cunningham said that at the time the defendant had not committed any traffic violation or other offense. Cunningham's partner, Renkenberger, then walked over to the car, looked in and saw a gun on the floor of the passenger's side of the automobile.

On cross-examination Police Officer Cunningham testified that after his partner had found the gun they put the defendant and his brother against the car and searched them.

The trial court, in denying the motion to suppress, said:



"The court has listened very carefully to the Motion to Suppress, there was testimony that the gun was found, where the feet would be, which in the Court's opinion, would establish the position of the weapon. The question of it being 2:30 in the morning or 2:15 in the morning and the only two people on the street, and in an area where any such activity in the morning could possibly be suspicious is an interesting one to this court, it's not a favorable one, but an interesting one. Where you have a business, where there is testimony that it has been burglarized and this is personal knowledge of the officers, I believe that it would be reasonable to expect that the officers would have to be especially aware and especially alert as to any unusual circumstances whatsoever.

"The officer testified that the gentlemen occupying the vehicle proceeded with a left turn which was completely legal, and then proceeded to attempt to follow these people. I think the stop was reasonable at 2:15 in the morning. I think it's the officer's duty to investigate. The Court has no choice but to deny your motion to suppress, the motion is denied."

At the trial Police Officer Renkenberger testified that on July 15, 1972, he was at 3055 S. Wallace, Chicago, Illinois, and had occasion to arrest two individuals whom he identified in court as James and Michael Naujokas; that State's Exhibit No. 1 and State's Exhibit No. 2, being a .38 caliber revolver and ammunition, were obtained from underneath the front seat of a 1962 Chevrolet, 2-door, red car; that just prior to the arrest the defendant was sitting in the driver's seat of the car and his brother was in the passenger seat of the car. Renkenberger further testified that both individuals got out of the car and the revolver was left under the front right side of the car; and that part of the handle just below the firing mechanism was visible. Renkenberger said he advised the defendant of his constitutional rights; that the defendant said he did not know whose gun it



was; that then after a little conversation the defendant said it was his gun, which he got from some person he did not know for a "jug"; that the defendant made this statement at the police station in the presence of Officer Cunningham and the defendant's brother; and that at the time of the arrest Renkenberger asked the defendant whether he had a City or State Firearm Owner's Identification Card and the defendant said he did not have one.

Officer Renkenberger further testified that he had been a police officer for approximately five years; that during that period of time he had become familiar with street language; and that a "jug" usually refers to a bottle of wine or a bottle of beer.

On cross-examination Officer Renkenberger said he did not see the defendant driving the automobile; that the defendant said he owned the automobile; and that Michael opened the door on the right side of the car at the request of Renkenberger. Renkenberger further testified that when the defendant and his brother went into the alley, they looked directly at him; that they were standing under the light from the school; and that Renkenberger was about 15 feet away from them.

On redirect-examination Renkenberger testified that the keys to the automobile were in the ignition of the car.

The defendant testified that he had no knowledge of a weapon being in the car prior to the time the police officers showed him the pistol; that he did not make any statements to the police; that he did not own a pistol;





and that he does not own an automobile or have a driver's license. The defendant further testified that he did not tell the officer he owned the automobile and that he did not have any knowledge how the pistol got into the car.

The defendant, relying upon the case of Terry v. Ohio, 392 U.S. 1, 20 L.ed.2d 381, 88 S.Ct. 1503, argues that the police lacked ample justification to warrant the "stop", that the "stop" was a seizure of defendant's person, that the seizure of defendant's person was unreasonable, and, therefore, violative of defendant's constitutional right of freedom from unreasonable search and seizure. The defendant further argues that the record reflects no "specific and articulable facts" which would justify a "stop". The defendant states the facts as follows:

"Those facts which prompted the officer to make the 'stop' consisted of observing the defendant make a left turn at the intersection of 31st and Wallace, bring the car to a stop just north of the intersection, leave the car and walk down an alley. The time was approximately 2:15 A.M. The pursuit by the officers, their failure to find the defendant in the alley and their return to the car to find the defendant walking back to the parked car do not constitute 'specific and articulable facts' which would permit a conclusion by the officers that criminal activity involving the defendant was afoot."

However, the defendant omits the significant testimony of Police Officer Cunningham to the effect that the reason the police officers were following defendant and his brother was "because the Del Farm had been known to be burglarized and there isn't an alarm on the building, two people are walking in an alley at approximately 2:15 in the morning it gave us reason enough to go and find out just exactly why were people walking in the alley at 2:15".



In Terry v. Ohio, 392 U.S. 1, the court said (pp.22-23):

"Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." (Emphasis added.)

Likewise, in the case at bar the situation is quite different where two men parked their car in close proximity to the "Del Farm Food store, which had known to be burglarized and there isn't an alarm



on the building; two people are walking in an alley at approximately 2:15 in the morning", it would have been "poor police work indeed for an officer" of five years' experience "to have failed to investigate this behavior further."

In light of the record, the police officers were justified in stopping the defendant and his brother to further investigate their behavior "even though there was no probable cause to make the arrest" (392 U.S., p. 22).

With the determination that the police officers were legally justified in stopping the defendant and his brother for investigative purposes, it necessarily follows that the police officers properly seized the gun lying in plain view on the floor of the automobile on the passenger's side of the front seat. The law is clear that there is no search involved when the seized article is in plain view. In People v. McCracken, 30 Ill.2d 425, 197 N.E.2d 35, the defendant contended that certain evidence seized from him at the time of his arrest should have been suppressed as being the result of an unlawful search. In rejecting this argument, the court said (30 Ill.2d, p. 429):

"We have held that a search implies the prying into hidden places for that which is not open to view; and that a search implies an invasion and quest with some sort of force, either actual or constructive (People v. Woods, 26 Ill.2d 557; People v. Marvin, 358 Ill.426, 428). Where, as here, the articles are in plain and open view and are observed by police officers under suspicious circumstances, it is not a 'search' nor an unreasonable seizure for the officers to make a reasonable investigation thereof." (Emphasis added.)





Other cases to the same effect are People v. Johnson, 15 Ill.App.3d 741, 744, 305 N.E.2d 208; People v. Bombacino, 51 Ill.2d 17, 280 N.E.2d 697 (cert. denied in 409 U.S. 912).

The defendant also relies upon the case of People v. Davis, 2 Ill.App.3d 185, 276 N.E.2d 55 (Abst.Opinion), where the State appealed from an order granting the defendant's motion to suppress evidence. The Davis case is not applicable because there the evidence was secured after a search of the defendant, while in the case at bar the defendant was not searched because the gun was in plain view.

When Police Officer Renkenberger saw the revolver belonging to the defendant on the floor of the front right side of the car, there arose probable cause to arrest the defendant, and, therefore, the trial court's denial of the motion to suppress was proper. People v. Ortiz, 16 Ill.App.3d 13, 305 N.E.2d 418.

It is apparent that the trial court did not err in denying the defendant's motion to suppress and, therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

Third Division: Justice Mejda did not participate.





59013

PEOPLE OF THE STATE	)	APPEAL FROM
OF ILLINOIS,	)	CIRCUIT COURT
	)	COOK COUNTY
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
ZYGMUND NOGAS,	)	HONORABLE
	)	JAMES M. WALTON,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

The defendant, Zygmund Nogas, was charged with aggravated assault in violation of section 12-2(a)(1) of the Criminal Code [Ill.Rev.Stat. 1971, ch. 38, par. 12-2]. After a bench trial he was found guilty and sentenced to a term of six months in the House of Correction. The issues on appeal are:

- 1) whether the defendant was found guilty of aggravated assault beyond a reasonable doubt;
- 2) whether the question of defendant's guilt of criminal damage to property is before this court for review; and
- 3) whether the defendant understandingly waived his right to a jury trial.

The record discloses that Mrs. Stefania Nogas, the complainant and mother of the defendant, does not speak English, but stated through an interpreter that she would rather not testify, and was not called as a witness by the State.

Police Officer James Whigham testified that on September 27, 1972, while on routine patrol, he heard eight gunshots and proceeded to 1539 [sic] West Fry Street, in Chicago, where he saw the defendant armed with a .22 caliber revolver; that he saw Mrs. Nogas standing behind a wall in the apartment, screaming; and that the defendant pointed the gun through the broken window. Whigham further testified



that he announced he was a police officer and ordered the defendant to drop the gun, but defendant refused to do so; that Whigham told the defendant he was under arrest; that the defendant pushed and shoved Whigham; and that it was necessary to throw the defendant to the ground and place him in hand irons to restrain him. The gun in defendant's possession was introduced in evidence.

The defendant testified that on September 27, 1972, he was in front of his apartment at 1537 West Fry, Chicago; that he did not threaten his mother; that he did not push a gun at her; and that he did not break the window. On cross-examination he testified that the policeman did not take the gun away from him, that he threw the gun in the grass; and that on the day he was arrested his mother was in the house.

At the close of all the evidence the trial court stated: "There is a finding of guilty on the aggravated assault and a finding of guilty on the criminal damage to property."

The defendant argues that the State failed to prove the crime of aggravated assault because the complainant did not testify and because the evidence was insufficient to prove that the defendant's conduct toward the complainant was sufficient to give her reasonable apprehension of receiving a battery.

Although Mrs. Nogas filed the complaint charging defendant with the offense of aggravated assault upon her with a deadly weapon, she did not testify at the trial. The testimony of a single witness, if it is positive and credible, is sufficient to convict, even though the testimony is contradicted by the accused. People v. Muhlethaler, 9 Ill.App. 3d





388, 292 N.E. 2d 438. The State, however, is not obligated to produce every witness who might testify concerning evidence of the crime. People v. DeSavieu, 11 Ill.App. 3d 529, 297 N.E. 2d 336; People v. Farnsley, 53 Ill.2d 537, 293 N.E. 2d 600.

Police Officer Whigham testified that he observed the defendant break the front window of the apartment with a gun, and that Mrs. Nogas was standing behind a wall inside the apartment, screaming as the defendant pointed the gun through the broken window. The defendant testified that he threw the gun in the grass, but denied that he threatened his mother, denied that he ever pushed the gun at her, and denied that he broke the window.

The testimony of the defendant is in direct contradiction with that of Officer Whigham as to whether Mrs. Nogas was placed in a reasonable apprehension of receiving a battery. In a bench trial it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt, the finding of the trial judge will not be disturbed. People v. Bracey, 129 Ill.App. 2d 57, 262 N.E.2d 748; People v. Catlett, 48 Ill.2d 56, 268 N.E. 2d 378; People v. Simental, 11 Ill.App. 3d 537, 297 N.E. 2d 356.

In the case before us the trial court was of the opinion that the defendant had "lied about twenty times in the course of the trial." There is nothing in the record other than defendant's testimony that tends to contradict or discredit the testimony of Police Officer Whigham. There is sufficient evidence to establish that Mrs. Nogas was placed in reasonable apprehension of receiving a battery, and to



establish the guilt of the defendant beyond a reasonable doubt. The trial court was in a better position to observe the demeanor and to determine the credibility of the witnesses during the trial. Under such circumstances this court will not disturb the finding of the trial court.

The defendant also argues that he was not proved guilty of the charge of criminal damage to property beyond a reasonable doubt. He concedes that the record does not contain a complaint charging criminal damage to property. The record is limited to the aggravated assault charge. The notice of appeal does not contain any reference to proceedings relative to a charge of criminal damage to property. It is limited to the finding of guilty of aggravated assault and the sentence of six months in the House of Correction. Accordingly, the question of whether the defendant was properly found guilty of criminal damage to property is not before this court for review. A defendant may not seek the review of a conviction where his appeal was not properly effected. People v. Ilg, 60 Ill.App. 2d 295, 210 N.E. 2d 20. The defendant did not comply with the provisions of Illinois Supreme Court Rule 606, which pertains to the perfection of criminal appeals [Ill.Rev. Stat. 1971, ch. 110A, par. 606], and thus his argument as to the finding of guilty of criminal damage to property is not properly before this court for review. People v. Harvey, 5 Ill.App. 3d 499, 285 N.E. 2d 179 [U.S. cert.den. in 410 U.S. 983].

The defendant further argues that he did not understandingly waive his right to a jury trial. At trial, the defendant was represented by an Assistant Public Defender. When the case was called for trial, the following occurred:



THE CLERK: Zygmund Nogas?

THE COURT: No, we have a charge of aggravated assault, and possession of a firearm without a registration with the State and City, and damage to property.

MR. CONNOLLY: There is an unlawful use of weapons charge, too, there is a UYW too.

THE COURT: No. Are you ready for trial on those charges?

THE DEFENDANT: Yes, sir. Yes, Judge.

THE COURT: All right, I'm going to appoint the Public Defender as your attorney. Now you will be called later for trial.

THE DEFENDANT: Thank you, sir.

(Proceedings halted and resumed.)

THE CLERK: Zygmund Nogas? Stephanie Nogas, complainant?

THE COURT: Is the State ready on this case?

MR. CONNOLLY: Yes, Judge, we are ready.

THE COURT: Is the defendant ready?

THE DEFENDANT: Yes, sir.

MISS HILLYARD: We are ready to proceed, Judge.

MR. CONNOLLY: Plea?

MISS HILLYARD: Plea of not guilty, Judge, jury waived, and no motions as far as I know.

THE COURT: Swear them.

(Whereupon all the witnesses in this cause were duly sworn.)

In People v. Sailor, 43 Ill.2d 256, 253 N.E. 2d 397, the court held that a defendant ordinarily speaks through his attorney and that by permitting his attorney, in his presence and without objection, to waive his right to a jury trial, a defendant is deemed to have acquiesced in and is bound by his attorney's conduct. Also see People v. Punyko, 9 Ill.App. 3d 1052, 293 N.E. 2d 672.

The rule announced in the Sailor case is applicable to court-appointed counsel. People v. McClinton, 4 Ill.App. 3d 253, 280 N.E. 2d 795; People v. Suriwka, 2 Ill.App.3d 384, 276 N.E. 2d 490.





The defendant relies upon the cases of People v. Baker, 126 Ill.App. 2d 1, 262 N.E. 2d 7, and People v. Boyd, 5 Ill.App. 3d 980, 284 N.E. 2d 699, which were cited and rejected in People v. Taylor, 13 Ill.App. 3d 253, 300 N.E. 2d 862, abstract opinion. In Taylor the court held that the defendant waived his right to a jury trial under facts similar to those in the instant case.

Here the record discloses that a period of time elapsed between the trial court's appointing the Public Defender to represent the defendant and the actual beginning of the trial. It would appear that the Assistant Public Defender had conferred with the defendant prior to the time the case was called, and that the defendant had agreed to waive the jury trial. Further, defendant's conduct in permitting his attorney, in his presence and without any objection, to waive his right to a jury trial and enter a plea of not guilty, constituted a valid jury waiver binding upon the defendant.

The judgment of the trial court finding the defendant guilty of aggravated assault and sentencing him to six months in the House of Correction is affirmed.

Judgment affirmed.

THIRD DIVISION.

Justice Dempsey did not participate.





59277

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	
	)	Court of Cook County.
v.	)	
	)	
EDWARD M. CAMPBELL,	)	Daniel J. Ryan, J.
	)	
Defendant-Appellant.	)	

PER CURIAM:

Edward M. Campbell, defendant, was charged by indictment with one count of unlawful possession of a controlled substance (Ill. Rev.Stat., 1971, ch. 56-1/2, par. 1402(a)) and two counts of aggravated battery (Ill.Rev.Stat., 1971, ch. 38, par. 12-4(b)(6)). After a bench trial, defendant was found guilty and was sentenced to a term of 10 to 20 years on each count of the indictment, the sentences to run concurrently. Defendant was also fined \$5,000. Defendant appeals, arguing that he was not proven guilty beyond a reasonable doubt and that the sentences are excessive.

At trial, the following evidence was adduced: Michael Cummings, a Chicago Police Officer, testified that on October 7, 1971, at 11:50 P.M., he and his partner, Rudy Rodriguez, observed an automobile, which defendant was driving, make an improper left-hand turn at 63rd and Ashland, Chicago. They stopped the vehicle at approximately 6217 Marshfield, Chicago. Defendant stepped out of the vehicle and Officer Cummings advised him that he had committed a traffic violation. Officer Cummings asked defendant for his driver's license and defendant replied that his license was in the glove compartment. Defendant leaned over the



front seat of the car and picked up a green plastic bag. Officer Cummings told defendant to put the bag back down onto the seat of the car. Defendant then swirled around, pushed Officer Cummings into his partner and threw the bag into the street. Defendant then started to get back into the vehicle. As Officer Cummings and his partner tried to subdue the defendant, a scuffle ensued during which defendant struck both Officer Cummings and his partner. After defendant was subdued, the bag defendant had thrown into the street was recovered. The bag contained 24 packets of a white powder. The packets were then taken to the Chicago Police Crime Laboratory.

Defendant was taken to the police station and advised of his constitutional Miranda warnings. He was asked what was in the packets that he threw out of his car. Defendant stated that the packets contained cocaine and he was delivering them for a friend.

It was stipulated that the report from a Chicago Police chemist showed that the 24 packets contained cocaine, a narcotic drug, in the amount of almost two pounds. Defense counsel further stipulated to the chain of evidence as introduced.

The defendant testified that on October 7, 1971, he was stopped by Officer Cummings and his partner for a traffic violation in the 6200 block of Marshfield, Chicago. At that time he was driving his sister's car which he had received only 10 to 15 minutes prior to being stopped. Officer Cummings came up to his car and asked who owned the car. Defendant replied that the car belonged to his sister. Officer Cummings then asked for his driver's license which he produced. Defendant testified that Officer Cummings pulled him out of the car and then





searched the car, finding the bag in the rear seat of the vehicle. Defendant denied ever knowing that the bag was in the rear seat or fighting with the officers. Defendant also denied that he ever made any statements to the police officers.

Officer Cummings was called in rebuttal and testified that after the defendant was stopped, a fight ensued in his attempt to arrest the defendant. He testified that defendant did not produce a driver's license from his wallet. After being given his Miranda warnings, defendant stated that the packets contained cocaine. On cross-examination, Officer Cummings testified that his original case report did not state anything about an admission by the defendant.

Defendant's first contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt will the finding of the trial court be disturbed. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Poynter, 6 Ill.App.3d 113, 285 N.E.2d 171. The testimony of one witness, if positive and credible, is sufficient to sustain a conviction, even though contradicted by the accused. People v. Bonds, 132 Ill.App.2d 827, 270 N.E.2d 575.

Defendant now urges that the testimony of Officer Cummings was unpersuasive and incredible. Defendant argues that great doubt is cast upon the officer's testimony by the fact that his written report did not state that defendant had made a statement regarding the offense.



Defendant also argues that the arrest report written by the officer mentions only in an addition between lines that defendant had thrown the bag containing the cocaine out of the car and into the street.

After a review of the entire record, we conclude that the testimony of Officer Cummings was positive and credible. He testified that after stopping defendant for a traffic violation he requested defendant's driver's license. As defendant leaned into the car, he grabbed a plastic bag, which was lying in the front seat. When told to drop the bag, defendant pushed Cummings and threw the bag into the street. After a scuffle, during which defendant struck both officers, he was subdued and the bag recovered. The bag was later found to contain cocaine. Minor discrepancies such as those pointed out between the officer's testimony and the police report, which was quickly made out after the incident, are at best matters of credibility which are for the trial judge to determine. People v. Bell, 53 Ill.2d 122, 290 N.E.2d 214; People v. Thomas, 127 Ill.App.3d 444, 262 N.E.2d 495. The trial judge, after hearing and seeing all of the evidence, found that the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt. We cannot say that the trial court's determination was erroneous.

Defendant's second contention on appeal is that his sentences are excessive. Defendant was convicted of unlawful possession of a controlled substance (Ill.Rev.Stat., 1971, ch. 56-1/2, par. 1402(a)). Under the Unified Code of Corrections, a violation of this section, where a defendant possesses over 30 grams



of any substance containing codeine, is a Class I felony (Ill. Rev.Stat., 1972 Supp., ch. 56-1/2, par. 1402(a)). The Code provides that for a Class 1 felony, the maximum term shall be any term in excess of four years (Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-8-1(b)(2)) and the minimum term shall be four years unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term (Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-8-1(c)(2)). Defendant's sentence of 10 to 20 years for unlawful possession of a controlled substance is therefore within the statutory limits provided by the Code and a review of the record discloses that the sentence is proper.

Defendant was also convicted of two counts of aggravated battery (Ill.Rev.Stat. 1971, ch. 38, par. 12-4(d)). The Unified Code of Corrections provides that aggravated battery is a Class 3 felony (Ill.Rev.Stat., 1972 Supp., ch. 38, par. 12-4(d)). The Code provides that the penalty for a Class 3 felony shall be a maximum term in excess of one year, not exceeding 10 years (Ill. Rev.Stat., 1972 Supp., ch. 38, par. 1005-8-1(b)(4)) and a minimum term of one year, unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term which shall not be greater than one-third of the maximum term set in that case by the court. (Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-8-1(c)(4)). Here, defendant's maximum sentence for aggravated battery is excessive and must be reduced to a term of 10 years. Similarly, his minimum sentence is excessive and must be reduced. Considering the nature of the battery in this case — Officer Cummings was hit in the



back and pushed into Officer Rodriguez — the minimum sentence will be reduced to one year.

Accordingly, the judgment of the Circuit Court, finding defendant guilty of unlawful possession of a controlled substance, is affirmed. Defendant's sentences on the charges of aggravated battery are modified by reducing the maximum sentence to a term of ten years and the minimum sentence to one year and, as modified, are affirmed.

Judgments affirmed as modified.

Third Division: Justice Mejda did not participate.







57559)  
57880)

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.	)	
	)	HON. JOHN REYNOLDS and
NORMAN NORYS,	)	RICHARD J. FITZGERALD,
	)	Presiding
Defendant-Appellant.	)	

\* PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Norman Norys, defendant, was originally charged by indictment with theft (Ill. Rev. Stat. 1969, ch. 38, par. 16-1(a)(1)). On September 8, 1969, defendant entered a plea of guilty and was placed on probation for a period of five years. Defendant did not appeal that conviction.

Subsequently, defendant was charged by complaint with three charges of driving on a suspended or revoked license (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 6-303) and one charge of leaving the scene of an accident (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 11-401(a)). On March 16, 1972, defendant entered a plea of guilty to all four complaints. Defendant was sentenced to a term of one year in the House of Correction on each charge, the sentences to run concurrently. Defendant appeals those convictions.

On March 17, 1972, a hearing was held on a rule to show cause why defendant's probation should not be revoked on the theft charge. At the hearing, the only evidence presented was that defendant had entered a plea of guilty to the four misdemeanor offenses on March 16, 1972. Defendant's probation was revoked and he was sentenced to a term of two to five years.



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Defendant appeals that sentence. Both cases have been consolidated in this court.

Defendant's first contention on appeal is that he was not properly admonished pursuant to Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402) prior to entering his pleas of guilty to four misdemeanor charges on March 16, 1972. The State, in its brief, concedes that defendant was not properly admonished. The transcript demonstrates that defendant's attorney informed the trial judge that defendant wished to withdraw his previously entered plea of not guilty and enter a plea of guilty. The court asked defense counsel if he had informed defendant of the consequences of his plea and defense counsel replied that he had informed defendant that he could go to jail for a term of seven days to one year on each charge. Defendant was given no further admonishment by the trial judge. Under these circumstances, we agree that defendant was not properly admonished pursuant to Supreme Court Rule 402 prior to entering his plea of guilty. Those convictions must therefore be reversed and the cause remanded for the defendant to plead anew.

Defendant's second contention on appeal is that the order revoking his probation must be reversed as it was predicated solely upon the four misdemeanor convictions, which were improper. We have previously held that defendant's pleas of guilty were invalid and must be reversed. Our reversal of those convictions eliminated the basis of the order revoking defendant's probation. (People v. Kaplan, 7 Ill. App. 3d 155, 287 N.E.2d 246.) The order revoking defendant's probation must therefore be reversed and the cause remanded with directions to the trial



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judge to hold an evidentiary hearing on the rule to show cause to determine whether there are facts sufficient to support the charges set forth therein and whether defendant's probation should or should not be revoked.

Defendant's convictions for driving with a revoked or suspended license and leaving the scene of an accident are reversed and the cause is remanded to the circuit court of Cook County with directions to allow the defendant to plead anew. The order revoking defendant's probation is likewise reversed and the cause remanded to the circuit court of Cook County for further proceedings not inconsistent with our views.

JUDGMENT REVERSED AND CAUSE REMANDED  
WITH DIRECTIONS.

\* MR. JUSTICE GOLDBERG took no part.

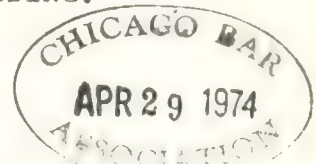




58050

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
v.	)	
	)	
CURTIS LEE SMITH,	)	HONORABLE
	)	ROBERT J. COLLINS,
Defendant-Appellant.	)	PRESIDING.

\*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):



Following a bench trial, the defendant Curtis Lee Smith, was convicted of attempt armed robbery and attempt rape in violation of Ill. Rev. Stat. 1971, ch. 38, par. 8-4, and sentenced to not less than one nor more than five years in the Illinois State Penitentiary. On this appeal, he maintains that the conviction for attempt rape should be reversed, because both convictions arose out of the same transaction and, secondly, that the one year minimum sentence imposed contravenes the provisions of the new Unified Code of Corrections (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-8-1(c)(4)) because the maximum of five years is more than three times the minimum of one year actually imposed.

The facts are not in dispute and the defendant does not contend that they were not sufficient to prove him guilty beyond a reasonable doubt. The complainant testified that she was about to enter her automobile after visiting with her sister when the defendant put a gun into her side and told her to get into the car. She had difficulty complying with this command because she was disabled, in that she had two artificial limbs. Defendant pushed her in the car and asked if she had some money, and when she said no, he said he didn't believe her. She said he could search the car if he didn't believe her and that her purse was in the back seat. He looked in the back seat and said he would blow her head off if he found only a penny and when he turned around, he said he was going to rape her and asked her to get into the back seat. When she again said she couldn't, he



took the gun and put it to her head and asked if she planned to cooperate. He then shot the gun into the back seat. She was able to pull herself over onto the back seat and defendant told her to close her eyes and she kept them closed. Defendant said the police were coming, to act naturally, she heard a voice say, "What's going on?", and looked at the gun on the seat and showed it to the patrolman. The Chicago police officer arriving on the scene to investigate observed the defendant lying on top of the complainant with his penis in his hand. The defendant was captured after a chase and the .357 magnum Derringer, with one expended and one live cartridge, was introduced into evidence.

Defendant maintains that it was error to convict him of both attempt robbery and attempt rape, since both of those offenses arose out of the same course of conduct on his part. However, the facts in the instant case support convictions for both attempt rape and attempt robbery since the attempt rape followed subsequent to the attempt robbery, which was complete by the time defendant announced his intention to rape the complainant. (See People v. Smith (1972), 6 Ill. App. 3d 259, 285 N.E. 2d 460.) However, assuming that both offenses arose out of the same course of conduct, it does not follow that the convictions must be reversed since only one sentence was imposed. (As to the question of whether both the conviction and the sentence for the lesser offense should be set aside, or whether only the sentence should be set aside and the conviction allowed to stand, see People v. Lilly, 9 Ill. App. 3d 46, 291 N.E. 2d 207; People v. Lilly, Ill. S. Ct. No. 45788, Lv. to App. allowed, May, 1973 term; People v. Brown, 15 Ill. App. 3d 205, 303 N.E. 2d 465.)

Defendant has misapprehended the meaning of paragraph 1005-8-1(c)(4) of the new Unified Code of Corrections which provides that the minimum term for a Class 3 felony "shall not be



greater than one-third of the maximum term set in that case by the court." Paragraph 1005-8-1(b)(4) provides that the maximum term for a Class 3 felony "shall by any term in excess of one year, not exceeding ten years." Here, the defendant's minimum sentence of one year is considerably less than one-third of the five year maximum actually imposed by the court and the five year maximum is well within the statutory limits. Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

\*Egan, P.J., took no part.



PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. )  
 )  
 JOHN E. LOFTHOUSE, )  
 )  
 Defendant-Appellant. )

HONORABLE  
DANIEL J. WHITE,  
PRESIDING.

Defendant was found guilty after a bench trial of the offense of unlawful use of weapons in violation of section 24-1(a) (4) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a) (4).) and was sentenced to a term of four months in the House of Correction. He appeals, arguing: (1) that the search of the vehicle in which he was a passenger was illegal; (2) that the State did not prove beyond a reasonable doubt that the gun was concealed; and (3) that the State did not prove beyond a reasonable doubt that he had possession of the gun.

At the motion to suppress and at trial the following evidence was adduced. Chicago Police Officer Bobbik testified that on December 31, 1972, at 1100 W. 35th Street, at approximately 12:10 a.m. he stopped a 1964 Chevrolet for going through a stop sign at 35th and Aberdeen. Defendant was seated in the right rear seat of the vehicle. Officer Bobbik testified that as he was standing on the curb with his head approximately seven inches above the rear of the vehicle, he observed what appeared to be the butt and trigger of a gun partially concealed under the right rear seat of the vehicle where defendant was seated. A search of the vehicle then revealed a .38 caliber revolver and a holster under the rear seat. Defendant's feet were directly over the gun.

Defendant testified that on December 31, 1972, at approximately 11:30 p.m. he was walking down the street with Carlos Venova when a man named Joe pulled up and offered them a ride to a party at 38th and

\*Mr. JUSTICE DRUCKER did not participate.





Lowell. He got into the right rear seat and Venova got into the left rear seat. Venova's brother Frank was seated alongside Joe. As the car proceeded down the street, Joe ran a red light. The car was then stopped by Officer Bobbik. Defendant denied at any time knowing that there was a gun in the vehicle or seeing a gun in the vehicle.

Defendant's first contention on appeal is that the search of the car in which he was a passenger was illegal. He argues that the car was stopped merely for a traffic offense which in itself was insufficient to give the officers the right to search.

The United States Constitution does not prohibit all searches, but only those which are unreasonable. Each case must be determined separately upon its special circumstances. (United States v. Rabinowitz, 339 U.S. 56, 63.) Although a lawful arrest for a minor traffic violation does not ipso facto authorize the search of a vehicle, there are circumstances when an on-the-scene search of the vehicle is justified. People v. Barksdale, 14 Ill. App. 3d 415, 302 N.E.2d 718.

In People v. Zazzetti, 6 Ill. App. 3d 858, 286 N.E.2d 745, the defendant's vehicle was stopped for a traffic violation. As the officers approached the car, they observed what appeared to be the portion of the butt of a revolver protruding from beneath the front seat of the passenger's side of the vehicle. On appeal, the defendant argued that there was no probable cause for a search of the vehicle. Rejecting this contention, this court said:

"He [police officer] did see enough, however, to establish probable cause for an arrest and entry into the vehicle for the purpose of securing evidence of the apparent offense."

In the case at bar, Officer Bobbik testified that as he stood on the curb with his head approximately seven inches above the vehicle, he observed what appeared to be the butt and trigger mechanism of a revolver on the floor of the rear seat. This provided a sufficient basis for the officer's entry into the car and the seizure of the revolver.



Defendant's second contention on appeal is that the State did not prove his guilt beyond a reasonable doubt because the evidence did not establish that the weapon was concealed. He argues that Officer Bobbik's testimony establishes that the weapon in the car was clearly visible and identifiable as a weapon and was therefore not concealed. A gun is concealed within the meaning of the unlawful use of weapons statute even though there is some notice of its presence. All that is required is that the gun be concealed from ordinary observation. A gun may be concealed from ordinary view even though there is some notice of its presence to an alert officer who could see part of the gun upon approaching the vehicle. People v. Barksdale, 14 Ill. App. 3d 415, 302 N.E.2d 718.

In the case at bar, Officer Bobbik testified that he observed the weapon only after approaching the vehicle while standing with his head approximately seven inches above the right rear of the automobile, looking down onto the floor. Under these circumstances, the trial judge properly found that the weapon in question was concealed within the meaning of the statute.

Defendant's final contention is that the evidence does not establish his guilt beyond a reasonable doubt because there was no proof that he possessed the weapon. Defendant argues that the State introduced no evidence to show that he had knowledge of the presence of a weapon or that it was within his immediate and exclusive control.

While knowledge is an essential element of the crime charged it may be proven by circumstantial evidence. (People v. Zazzetti, 6 Ill. App. 3d 858, 286 N.E.2d 745.) In People v. Williams, 132 Ill. App. 2d 806, 270 N.E.2d 144, the vehicle in which the defendant was a passenger was stopped for a traffic violation. As the officers approached the car, they observed the butt of a revolver under the driver's seat.

The occupants of the car were ordered out and a search of the car revealed a second revolver under the passenger's seat where the defendant was seated. Defendant appealed, arguing that the State failed



to prove that he had knowledge of the presence of the weapon and urged that his conviction was based solely upon the proximity of the weapon to him. In rejecting this contention and affirming defendant's conviction, this court said:

"It is our opinion that in the instant case the defendant was not convicted, as he contends, on the basis of his proximity to the weapons, but because of the reasonable inference of knowledge the court could draw from all of the uncontroverted circumstantial evidence presented at the trial."

It also said:

"If the revolver could be seen in a quick glance by the officer, standing outside, the trial judge could certainly infer that the defendant, a passenger in the car, was aware of its presence, as well as that of the second gun."

In the case at bar, Officer Bobbik testified that he observed the butt and trigger mechanism of the revolver, protruding from underneath the rear seat of the vehicle as he stood near the car. Defendant's feet were directly over the revolver. Under these circumstances, it was reasonable for the trial judge to infer that the defendant was aware of the gun's presence directly beneath his feet.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]

3-15-74  
Hypoth. de  
Papirinae



No. 73-67

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

FILED  
MAR 30 1974

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Christian County.
vs.	)	
	)	
ZACHARY L. SMITH,	)	Honorable Bill J. Slater,
	)	Judge Presiding.
Defendant-Appellant.	)	

PER CURIAM:

Appellant was convicted upon his plea of guilty of burglary and theft over \$150 and was sentenced to five to ten years' imprisonment.

The record does not show proper admonitions to the defendant regarding waiver of the right to jury trial and confrontation of witnesses against him, required by Supreme Court Rule 402(a)(4), or an adequate inquiry into the voluntariness of the plea, pursuant to Supreme Court Rule 402(b).

Because these errors require reversal and remandment, it is unnecessary to consider the other points raised in this appeal.

The judgment of the circuit court is reversed and remanded with directions to permit the defendant to plead anew.

Reversed and remanded with directions.

Justice Crebs not participating.

PUBLISH ABSTRACT ONLY.



18 I.A. 396

72-249

UNITED STATES OF AMERICA



State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
March 28, 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



Abstract

NO. 72-249

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

**FILED**  
MAR 28 1974  
LOREN J. STROTZ, Clerk pro tem  
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
LEONARD L. CRAGO, Jr. )  
 )  
Defendant-Appellant. )  
 )  
Appeal from the  
Circuit Court of  
the 19th Judicial  
Circuit, McHenry  
County, Illinois.

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

On Wednesday, October 20, 1971, at approximately 8:00 P.M., deputy sheriff Hanson, on patrol, approached the intersection of East Wonder Lake Road and Hancock Drive and noticed a lone motorcyclist travelling west on Hancock Drive toward the intersection. As the two reached the well-lit intersection, the driver of the motorcycle made a U-turn. From a distance of 30 to 40 feet, Hanson observed that the cyclist was wearing no eye protection in violation of Section 11-1404 of the Illinois Vehicle Code (Ill. Rev. Stat. 1971, ch. 95-1/2, §11-1404); he followed the cycle until its driver turned and drove into an open field. The officer made no attempt to follow or stop the cyclist that evening.

Three days later (Saturday), near the same intersection, Officer Hanson saw the individual who had been driving the motorcycle during Wednesday's incident, riding as a passenger on another motorcycle. When the cycle stopped, Hanson asked the passenger, defendant here, for his driver's license, defendant asked why he wanted to



see it, and Officer Hanson replied that he had seen the defendant driving three days prior and was going to issue a traffic citation for no valid driver's license. Defendant was then issued a ticket for driving without a valid driver's license in violation of section 6-101 of the Illinois Vehicle Code (Ill. Rev. Stat. 1971, ch. 95-1/2, §6-101). It was stipulated at trial that the defendant had never held a valid Illinois operator's license. A six-man jury found him guilty of driving without a valid license and he was sentenced to spend three days in the McHenry County jail.

It is contended that on Saturday, the officer had no valid reason to request defendant's driver's license and that his arrest was therefore without probable cause; that defendant was denied due process of law because he was not arrested and charged on Wednesday, and that he was not proven guilty beyond a reasonable doubt.

Relative to defendant's claim that there was no probable cause for him to be arrested on Saturday for driving without a valid license, it is argued that the ticketing officer could not have known prior to this time that defendant never held a driver's license nor could he demand that defendant, then a passenger, produce a valid license. We disagree. The law is clear that when a police officer witnesses an offense, he has reasonable grounds and authority to stop and arrest the offender. City of Crystal Lake v. Woit, 3 Ill. App. 3d 1059, 1061 (1972); also see, People v. Lucas, 41 Ill. 2d 370 (1968) for the proposition that probable cause for arrest without a warrant exists if an offense has been committed and the arresting officer has reasonable grounds for believing that the person to be arrested committed that offense.

At the time defendant was stopped, Hanson, having witnessed the Wednesday violation, had probable cause to arrest defendant for the offense of driving a motorcycle without the required eye protection. That Hanson learned on Saturday that defendant did not





hold a valid license three days earlier when he was driving a motorcycle and then ticketed him for that offense rather than for the initial violation witnessed, did not nullify the instant arrest.

City of Crystal Lake v. Woit, supra.

Defendant next claims that the officer's failure to speedily prosecute him was a denial of due process of law. He argues that if Hanson had grounds on Wednesday, he should have effected an arrest at that time or at least have taken down the license number and a description of the vehicle and its driver and sworn out a warrant that same evening. It is contended that a delay of 3 days in charging a minor offense under the Vehicle Code severely curtailed his opportunity to effectively prepare a defense. How the preparation of his defense was impaired or how he was prejudiced by the three-day period is not shown by the record. Defendant would have us rule, as a matter of public policy, that the delay here was a denial of due process. We decline to do so. See, People v. Love, 39 Ill.2d 436 (1968).

Finally, defendant urges that the identification testimony was insufficient to prove that he was the driver of the motorcycle on Wednesday and that his guilt, consequently, was not proved beyond a reasonable doubt. Hanson testified that on Wednesday he first observed a motorcycle when it was some 400 to 500 yards away as both approached the intersection and that when they were about 30 to 40 feet from each other at the well-lit intersection, he noted that the cyclist wore nothing on his head; that after the cyclist made a U-turn, he followed for a short time, never coming closer than 150 feet. The officer was able to identify the cyclist's clothing and its color and his in court identification of defendant was clear and positive. It has been often held that the testimony of even one witness, if positive and credible, is sufficient to convict. (People v. Catlett, 48 Ill. 2d 56, 63-64 (1971).) Our review finds no merit to this or the other issues raised and the judgment is, therefore, affirmed.

Judgment affirmed.

GUILD, P.J. and SEIDENFELD, J. - Concur



No. 58446

18 I.A. 3d 404

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
	)	
vs.	)	_____
	)	
JOHN T. RAMIREZ,	)	HONORABLE
	)	ALVIN A. TURNER
Defendant-Appellant.	)	PRESIDING



PER CURIAM\* (First District, Fifth Division):

Defendant was charged with leaving the scene of an automobile accident involving personal injuries, in violation of Section 11-401 of the Illinois Vehicle Code (Ill. Rev. Stat. 1971, ch. 95-1/2, par. 11-401). After a bench trial, defendant was found guilty and fined \$50 and \$5 costs. His post trial motion was denied, and on appeal he contends he was not proven guilty beyond a reasonable doubt.

Maxine Schreiber, the complaining witness, testified: On May 2, 1972, at about 7:20 P.M., she was involved in an accident in front of her house at 15226 Chicago Road, Dolton. She had parked her car and, as she placed her groceries on the trunk, a passing car struck her car causing damage to the left front door and fender. She observed that the driver had long hair, and kept turning around to look at her. He went about a block, slowed down, stopped a short while, and then drove away. After the collision, a young man on a motorcycle stopped and two or three other people came to the scene, and informed her that they had the license number of the other car.

Schreiber testified she was in shock and, having just been released from a hospital because of a heart attack, was taken by ambulance to a hospital, where she stayed for another fourteen days.

Lester Ballantine, a witness for the State, testified: On May 2, 1972, at 7:20 P.M., he was in the vicinity of 152nd and Chicago Road driving a motorcycle south on Chicago Road when he

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\* Justice Lorenz did not participate.



heard a collision. He saw dust and debris flying in the air. He then noticed that a lady, standing next to a car, was crying. She did not appear critically hurt, but she was holding her stomach. He drove ahead looking for a place to turn around, and noticed a car stopped off to his right. As he was turning around, he observed that the right fender of this car had been crumpled and its headlight knocked out. The vehicle was a turquoise, bluish-green 1962 Mercury. The distance the car was stopped from where the accident occurred "was about thirty yards, between one and two blocks." He took the license number of this vehicle.

It was daytime with good light and, as Ballantine was approximately 25 feet away from the driver of the car, he had a fairly good look at his face. He had no conversation with the occupant, who was alone in the car, but did notice that he had long dark brown hair, about shoulder length, and he either had a moustache or needed a shave. He testified he did not see that person in the courtroom at trial.

On cross-examination he testified:

Q. Mr. Ballantine, was the defendant driving that vehicle?

A. No, he was not.

Police Officer John Thompson, of the Dolton Police Department, a State's witness, testified: On May 2, 1972, he was called to investigate an accident. He arrived at the scene and saw that a lady was hurt and asked if she needed an ambulance. A witness gave him a license number and he radioed for a license check, which turned out to be the defendant's address in South Holland. He called the South Holland Police Department, which later reported that defendant was not at home but that his mother had been contacted. Defendant was at the police station when Officer Thompson arrived, and said he was there because his mother had informed him that Officer Thompson was looking for him. He had a conversation with defendant, who, when asked why he ran away, said he panicked. Defendant also





explained to the officer how the accident occurred stating "he was going by and didn't see the lady until the last minute. The moment of the collision he stopped, looked around and didn't think he hurt (sic) or anything and took off."

Defendant testified: He is 19 years old. On the 2nd of May, 1972, shortly before or after 7:00 P.M., he went to see his girl friend, Norine Cote, at her home at 15231 Evers. He drove there with Gavin O'Connell. When he arrived he went into Norine's home and, because he was stopping for only a short while, he left the keys in the ignition. O'Connell was in the car at that time.

About ten minutes after Ramirez went into his girl friend's house, O'Connell came into the house and said that he had an accident with defendant's car and explained how it occurred. Defendant had not noticed his car was gone. He then tried, by telephone, to reach someone from his insurance company but failed to do so. His mother then called and informed him the Dolton police were looking for his car, and she told him to go to the police station. O'Connell, who went to the police station with defendant, did not enter the back room where defendant had a conversation with the police officer. Defendant was asked whether he had been in an accident to which he made no reply. When the officer told him his car had been in an accident and described how it occurred, defendant made no comment. He didn't tell the officer he was not the driver because he was not asked.

He further testified he was not driving his car at the time of the accident; that he did not give permission to anyone to drive it; and that Gavin O'Connell, who is a foot taller with long brown hair, does not have a moustache or beard.

Connie Cote, called by defendant, testified: She lives at 15231 Evers, Dolton. On May 2, 1972, at about 7:00 P.M., as she was driving home with Judy Anderson, she saw defendant's car, a 1961 Mercury, at 152nd and Grant. It was being driven by Gavin



O'Connell, who was alone. She was very close to his vehicle, which was speeding and almost struck her car. Gavin then turned on Chicago Road and she went straight home. Her sister, her brother and defendant were in her house when she arrived and defendant's car was not then at her house. When she left with Judy Anderson, defendant was still at her house. Shortly after leaving, she again saw O'Connell driving the car on 151st, near Chicago Road. The first time she saw the 1961 Mercury she did not notice any damage to the vehicle, but the second time she thought the right side was dented in above the headlight.

Judy Anderson, called by defendant, testified: On May 2, 1972, about 7:00 P.M., she was with Connie Cote in Connie's car. She was familiar with the car of defendant and, while riding with Connie, she twice saw it; the first time on 152nd and Grant when she saw that Gavin O'Connell alone was driving. They then went to Connie's house on Evers where Connie went in the house while she (Anderson) waited in the car and when they left she again saw defendant's car, being driven by O'Connell, at 151st and Evers.

It was stipulated that another witness, Norine Cote, if called, would have testified that she also was in the house with defendant, and others, when Gavin O'Connell came into the house and told them he was driving defendant's car and had an accident.

#### OPINION

Defendant's sole contention on appeal is that he was not proven guilty beyond a reasonable doubt. It is well established that great weight should be given the findings of the trier of fact, including his appraisal of the credibility of witnesses, People v. Holt, 124 Ill.App.2d 198, 260 N.E.2d 291. However, the findings are not conclusive and it is the reviewing court's duty to set a conviction aside where the evidence is so unsatisfactory as to raise a reasonable doubt of a defendant's guilt. People v. Reese, 34 Ill.2d 77, 213 N.E.2d 526.

Here, an occurrence witness called by the State, Lester



Ballantine, who had observed the driver of the car which struck complainant's car and had obtained the license number, testified that defendant was not the driver. We note also that the complaining witness, the only other person testifying who had observed the occurrence, did not identify defendant as the driver.

Witnesses Connie Cote and Judy Anderson testified that, during the time frame of the occurrence, they twice saw defendant's car being driven by Gavin O'Connell and on neither occasion was defendant in the car. Connie Cote also testified that the first time they saw O'Connell driving defendant's car it was speeding and almost struck their car and it then turned onto Chicago Road (the street where the accident occurred). She further testified that she drove the short distance to her home and defendant's car was not there, but defendant was present. Shortly after leaving her home she again observed O'Connell driving defendant's car, at which time she believed the right side was dented in above the headlight. Defendant testified that he was not driving the car at the time of the accident, and that Gavin O'Connell was in the car and the key was in the ignition when he went into his girl friend's house. He also testified that O'Connell later entered the house, and said that he had an accident with the car. It was stipulated that Norine Cote, if called, would have testified that she was in the house with defendant and others, when Gavin O'Connell came in and reported he had been in an accident with defendant's car.

We believe that defendant was linked to the accident only by the testimony of Officer Thompson that defendant informed him he had run away because he had panicked, and that after the collision he had stopped, looked around, and when it appeared no one had been injured, he continued on. While defendant did not directly contradict the officer's testimony, he testified to a conversation with the officer which did not include any of the facts testified to by the officer, and he did deny he was the operator of the car.





Defendant's denial of involvement was supported by the testimony of the State's witness, Ballantine, also by Connie Cote, Judy Anderson, Norine Cote and by the fact that the complaining witness did not identify him as the driver.

From our examination of the entire record, we believe that the evidence is so unsatisfactory that it raises a reasonable doubt of defendant's guilt and requires a reversal of his conviction. People v. Pellegrino, 30 Ill.2d 331, 196 N.E.2d 670.

Accordingly, the judgment is reversed.

Judgment reversed.





No. 58899

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
	)	
vs.	)	
	)	
DAIR BANKS,	)	HONORABLE
	)	LAWRENCE I. GENESEN
Defendant-Appellant.	)	PRESIDING



PER CURIAM<sup>1</sup> (First District, Fifth Division):

Defendant was charged with unlawful use of a weapon in violation of section 24-1(a)(4) of the Criminal Code<sup>2</sup> (Ill. Rev. Stat. 1969, ch. 38, par. 24-1(a)(4)). After a bench trial, defendant was found guilty and sentenced to a term of 90 days. On appeal, defendant's only argument is that the trial court erred in denying his motion to suppress certain physical evidence seized at the time of his arrest.

The total evidence on the motion to suppress was the testimony of William Guswiler, a Chicago police officer, who testified that on April 18, 1971, he and his partner, Officer Bellini, observed defendant driving an automobile southbound on State Street. Seated in the car next to defendant was Robert Roberts and a Mr. Burroughs was sitting in the rear seat. The rear license plate light of the automobile was inoperable. Officer Guswiler stopped the vehicle, approached it, and observed defendant stuff two or three clear plastic bags containing a crushed green plant into a crease in the front seat. Believing the bags contained marijuana, defendant was asked to exit the car and was placed under arrest. At that time Officer Guswiler observed the butt portion of a .32 caliber pistol protruding from under the seat where defendant had been sitting. The officer also testified that as he approached the car he observed that the passenger, Roberts,

<sup>1</sup> Justice Lorenz did not participate.

<sup>2</sup> §24-1. (a) A person commits the offense of unlawful use of weapons when he knowingly:  
 (4) Carries concealed in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver or other firearm;



had a gun on his left hip. He also placed Roberts under arrest and when he searched him found a concealed packet of marijuana.

#### OPINION

Defendant's sole argument on appeal is that the trial court erred when it denied his motion to suppress the gun seized at the time of his arrest because the arrest was unlawful, having been made without probable cause.

A lawful arrest for a minor traffic violation does not, ipso facto, authorize the search of the driver and vehicle. People v. Mayo, 19 Ill.2d 136, 166 N.E.2d 440; People v. Watkins, 19 Ill.2d 11, 166 N.E.2d 433. However, where circumstances reasonably indicate that the police may be dealing not with the ordinary traffic violator, but with a criminal, then a search of the driver and his vehicle is authorized in order to insure the safety of the police officers and to prevent escape. People v. Tate, 38 Ill.2d 184, 230 N.E.2d 697; People v. Thomas, 31 Ill.2d 212, 201 N.E.2d 413; People v. Jefferies, 6 Ill.App.3d 648, 285 N.E.2d 592.

In People v. Davis, 33 Ill.2d 134, 210 N.E.2d 530, the defendant was arrested at 1:20 A.M. for making an improper turn and driving with no light on the rear license plate. After stopping defendant, the police observed a tinfoil packet on the floor of the driver's side and opened the package, which contained a white powder. The police officer then searched the car and found another tinfoil packet which contained narcotics in the crack of the front seat. The court held the search proper because the circumstances were sufficient to demonstrate to the police officers that they were dealing with more than a mere traffic violator.

In People v. Barksdale, et al, \_\_\_ Ill.App.3d \_\_\_ (1st Dist., Nos. 56277 and 56278), \_\_\_ N.E.2d \_\_\_, defendant on appeal argued that the trial court erred in failing to grant his motion to suppress physical evidence seized at the time of his arrest. The evidence demonstrated that defendant was stopped for making an illegal turn to avoid a traffic signal at 1:30 A.M. Defendant was



unable to produce a driver's license and it was later discovered that none of the occupants owned the automobile. Defendant was ordered to exit the car and as he did, the inside light turned on, revealing a gun sticking out from beneath the driver's seat. In holding the seizure of the gun proper, this court said:

"We believe that under these circumstances the officers were justified in questioning defendants in the alley at that time and in that area with their guns drawn and, when finding that the driver had no license, were justified in making a search of defendants and the car incident to the lawful arrest."

In the instant case, Officer Guswiler testified that defendant was stopped at 3:00 A.M. because he had no light on the rear license plate of his car. As the officer approached defendant's car, he observed defendant stuff two or three clear plastic bags containing a crushed green plant, which the officer believed to be marijuana, into a crease in the front seat. Upon his order, defendant exited the car and was arrested; at that time the officer noticed the pistol butt protruding from under defendant's seat in the car.

The testimony of the officer is indefinite as to when he observed that the passenger, Roberts, had a gun on his left hip. He stated that he saw this gun as he approached the car, but whether this occurred before or after his arrest of defendant, or before his observation of the gun under defendant's seat in the car, is not clear. In any event, we do not believe it is significant on the question as to whether there was error in the denial of the motion to suppress the gun found under the seat.

From our review of the record, we think the officer reasonably believed he was dealing with more than an ordinary traffic violator and we believe that defendant's arrest was justified and the searches of his person and the car were incident to that arrest.

Accordingly, we conclude the trial court correctly denied defendant's motion to suppress and the judgment is affirmed.

JUDGMENT AFFIRMED.



10-26-73

Del

5dp



18 I.A.<sup>3d</sup> 406



54768

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
OWEN PHIFER,	)	Hon. Felix M. Buoscio,
	)	Presiding.
Defendant-Appellant.	)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Owen Phifer (defendant) was indicted for unlawfully dispensing heroin and unlawfully being in possession of marijuana (Ill. Rev. Stat. 1967, ch. 38, par. 22-3.) After a jury trial, he was found not guilty of possession of marijuana and guilty of dispensing heroin. He was sentenced to 10 years to 10 years and one day in the penitentiary. He appeals.

In this court, defendant contends that the statute under which he was convicted is unconstitutionally vague; the indictment is void for failure to allege that he acted knowingly; the jury was improperly instructed in that the court failed to instruct that defendant's knowledge of the nature of the substance in question should have been proved beyond a reasonable doubt; there was a reasonable doubt as to defendant's knowledge of the offense; there was also "a reasonable doubt that defendant was entrapped into unlawfully dispensing a narcotic drug"; improper argument of the State deprived defendant of a fair trial and the sentence was excessive in view of recent legislation.

In response, the People urge that the statute in question is not unconstitutionally vague; the indictment is sufficient; failure of the court to instruct the jury was waived and was harmless error; the jury properly rejected the defense of entrapment; and the closing argument of the prosecution did not



deny defendant a fair trial. The State concedes, however, that defendant should be resentenced under the Illinois Unified Code of Corrections, Ill. Rev. Stat. 1971, ch. 38, pars. 1001-1-1 and following.

Defendant argues sufficiency of the evidence to support the conviction only in the limited areas regarding his knowledge of the nature of the substance in question and the defense of entrapment. However, a summary of the facts disclosed by the lengthy record is necessary.

The testimony discloses a bizarre series of incidents. At times several of the participants used names other than their own. We commence on December 28, 1967, with receipt of a suitcase at O'Hare Field in Chicago, at the Lost and Found Office of United Airlines. The bag had been checked on a flight from Los Angeles to Newark and was apparently diverted to Chicago by chance or accident. Since it remained unclaimed, the airlines personnel opened it to determine the identity of the owner. They found several packages, or bricks, containing dried weeds, with a dull green color. Eventually this was brought to the attention of Robert Kahn, then an Inspector in the State of Illinois Division of Narcotic Control. Kahn checked the contents of the bag and found 16 brick shaped packages of the crushed green plant. The bag was then kept under surveillance without result.

Shortly thereafter, Kahn received a telephone call from an employee of the airline giving him the telephone number of a man named Roger Singley who had called concerning the bag. Kahn called the number and spoke to a person who told him his name was "Thomas". Kahn told him that he was employed by United Airlines, and his name was Rich Cannon. Thomas said he understood



that the caller had something that belonged "to us." Kahn later ascertained that this man known as Thomas was actually a Chicago police officer named Bernard Bazile. Thereafter, Kahn received a telephone call from another person who identified himself as "James". He again responded that his name was Rich Cannon. James was later identified by Kahn as the defendant, Owen Phifer. Defendant asked Kahn if he wanted to make a deal for the bag. Kahn replied affirmatively but stated that he did not want money or part of the marijuana. Defendant asked if he wanted something harder like heroin. Kahn agreed and awaited further contact.

It developed that Herbert Phifer, a brother of defendant, had known Bazile from joint service in the United States Marines and knew that Bazile was in the Chicago Police Department. He called Bazile from New Jersey and told him that he had lost a shipment of 17 kilos. Bazile testified that in street terminology this referred to approximately 100 pounds of marijuana compressed into bricks. Herbert Phifer told Bazile that the marijuana had been lost in transit from California to New Jersey. He asked Bazile to ascertain who Richard Cannon was and whether he was actually employed by the airlines or whether he was a police officer. He gave Bazile a telephone number at which to reach Kahn (Richard Cannon).

In due course, Bazile contacted Kahn and they met in person on January 3, 1968. Kahn disclosed his true identity and purpose to Bazile. At that time, Bazile placed a long distance call to Herbert Phifer in New Jersey. Since Herbert was not available, he spoke to the defendant. Bazile told defendant that he would like to speak to his brother Herbert, if he could. Defendant stated that Herbert was in New York but that he (defendant) knew all about it and could tell him about it. Bazile then told defendant that he had checked out Richard Cannon and that he was





"real". Bazile told defendant that he knew what was in the bag and it was the same he had been speaking of. He further said that Cannon didn't want any cash and didn't want to bother with the stuff in the bag. At that time, defendant also said that he knew the bag contained "our stuff because the other half came through."

The next evening defendant called Kahn (Rich Cannon) and told Kahn that he understood they could make a deal if he could get Kahn some heroin. Kahn said that was correct. The man asked Kahn what he wanted for the 17 kilos. Kahn said that he wanted "an ounce of 'P' which he could whack about five to six times." In the vernacular of the street "P" refers to pure heroin. "Whack" means to adulterate the heroin with a substance like milk or sugar to prepare it for sale. Defendant said he would call Kahn at a later date.

Two days later defendant again called Kahn and said that he was getting the stuff from a western connection. He told Kahn that if he checked out "all right" that "we" would be in town Sunday. He then said he would call him again. On the following day, Herbert Phifer called Officer Bazile and told him that he would be in Chicago on the next day and that he would come to Bazile's house between one and three o'clock in the afternoon. On the next day (January 8, 1968) Herbert Phifer and defendant did come to Bazile's home. Bazile was then introduced to defendant for the first time. They inquired as to whether "Rich Cannon" had checked out. Bazile responded affirmatively and stated that Cannon worked as a baggage handler at United Airlines. At that time, Kahn called Bazile on two occasions. On the second call, he spoke to defendant. He told defendant that he had the marijuana and they could make a trade. However, defendant objected to meeting at the airport. Kahn insisted upon that location and said that he had "the stuff"





there and he would be working there until approximately 6:15 or 6:30 that evening. Kahn was stationed at O'Hare Field disguised as a baggage handler. He had secreted the suitcase and kept the Lost and Found Section under observation.

Bazile then drove from his home to O'Hare Field in his car, accompanied by defendant's brother, Herbert. Defendant drove there in his own car. Bazile contacted Kahn on the telephone and advised that they had arrived. Kahn left the Lost and Found Section and met with Bazile, the defendant and his brother. He identified himself as Rich Cannon. Defendant said he had the heroin and requested that the trade be made. He told Kahn that he would deposit a sample in a designated public telephone nearby. Defendant walked outside to his car for the purpose of getting the heroin. Other agents of the Narcotic Control Division were present in various disguises. Kahn then went to the telephone booth and took out a small tinfoil package from the money return slot of the public telephone. He went across the street with the sample, met another inspector of the Division of Narcotic Control, made a field test of the substance and determined that it was heroin of a very fine grade referred to as "P" or pure.

He then returned to the terminal and spoke to defendant. As a joke, he told defendant that the stuff was not good. Defendant replied that Kahn must be joking because, "this stuff is pure." Kahn said that he had been joking and they agreed to make the deal. Defendant then left to go out to his automobile to get the balance of the heroin. When he returned, he met Kahn. Kahn left, went to the locker and brought the suitcase. However, defendant insisted on inspecting the contents of the bag. The case was opened and defendant said, "That's my stuff" or "my case." The word "case" was designated as a shortened term for kilos. Defendant gave Kahn a brown envelope from a New Jersey Bank. He



opened it and found that inside there was a glazed envelope containing a white substance resembling heroin. As soon as Kahn had possession of the brown envelope, defendant said "Let's go." Kahn then signaled other inspectors and defendant and his brother were immediately arrested.

After proper warning, both were searched. Herbert Phifer had possession of a piece of paper with Bazile's telephone number written on it. Defendant had possession of a receipt indicating the transmission of \$1000 by telegraph from defendant to his brother Herbert in California during the latter part of December, 1967. Inspector Kahn testified he later had a conversation with defendant who told him that the marijuana had been shipped from Mexico and that the suitcase in question contained a partial shipment of more than 100 pounds. There was testimony that the envelope which was given to Inspector Kahn by defendant contained heroin to a total weight of 18.10 grams.

It should also be noted that defendant presented testimony from three ministers and two other witnesses regarding his good reputation for truth and veracity and for being a peaceful and law-abiding citizen. Defendant testified that his connection with this entire incident commenced during January of 1968 when he went with his brother, Herbert, to Chicago by automobile. This was only a "vacation" trip for him. Bazile and Herbert told defendant that their object was to arrest a narcotics peddler so that Bazile would get a promotion. At first defendant refused to participate. After urging, he agreed to proceed. Bazile then handed defendant a packet which defendant "believed" had previously been given to Bazile by Herbert. Defendant was told, "that it was definitely heroin." The three then proceeded to O'Hare Field. At that time, defendant was approached by Kahn who asked him if he knew Bazile and he responded affirmatively. Kahn asked him if he had "the stuff." When he said, "Yes" Kahn told him





that he was to put the stuff in a telephone booth which he indicated. Later, after further discussion, Kahn again approached him and said the stuff was no good but later Kahn said, "Don't worry about it. It's all right."

Defendant testified that he then walked outside and upon his return he met Kahn in front of the terminal. He then observed the suitcase or bag in question. Kahn asked him if that was the bag. He replied that he knew nothing about the bag but that he had instructions of what to do. Kahn asked defendant if he wanted to see the contents. Defendant said he did not know what the bag was about and that he did not care. Kahn placed the bag on a bench to open it but was unable to do so. He asked defendant to help him but defendant refused. Defendant, at this time, had a package in his glove which Kahn asked him for. Defendant refused but Kahn snatched the package and then began to run slowly away down the walkway. During this transaction, defendant had not seen his brother or Bazile. He walked around a short distance attempting to find them and then he was told that he was under arrest for violation of the narcotic laws.

Defendant also testified that he had never met Bazile prior to that day, January 8, 1968. Defendant testified that his brother and Bazile were the persons who wanted him to pass some stuff to a narcotics peddler and that he refused at first, but they, in effect, told him that Bazile had lost a bag which they wished to recover and that Bazile was then going to arrest a narcotics peddler. He did not know if the heroin was given to his brother by Bazile or vice versa. Bazile told him that it was nothing but sugar so far as he knew. When defendant inquired as to how a man could be arrested with sugar, Bazile laughed and told defendant it was "smack". After further questioning, he told defendant that "smack" was heroin. Defendant testified that he kept on saying that he would have nothing to do with it but they





told him not to worry. The last thing that defendant recalled from this conversation was that the material was "definitely heroin."

Defendant further testified that during December of 1967 he did not know a person named Roger Singley. He found that Singley lived somewhere in New Jersey and after considerable effort found his residence and had a conversation with him. Defendant denied that he had received telephone calls from Kahn or someone known by the name of Rich Cannon. When he was in New Jersey during that month, he did receive a telephone call from Bazile who told him only to tell his brother Herbert that "everything was O. K." He denied any agreement to trade the heroin for the marijuana in the bag and denied that he had any other conversation with Bazile. Defendant also testified that he came to Chicago with his brother only for the purpose of having a vacation.

Defendant first raises the question of constitutional validity of sec. 22-3 of the Criminal Code under which he was convicted (Ill. Rev. Stat. 1967, ch. 38, par. 22-3) which reads as follows:

"It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this Act. No person may unlawfully use narcotic drugs."

Defendant contends that this enactment deprives him of due process of law because it imposes absolute criminal liability without any stated requisite regarding intent. Defendant relies mainly upon Robinson v. California, 370 U. S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417, which is extensively commented on and followed in People v. Davis, 27 Ill. 2d 57, 188 N.E.2d 225.



This constitutional issue was never in any manner presented to the trial court and then preserved for review. It cannot be raised for the first time in this court and, therefore, should be regarded as waived. See People v. Amerman, 50 Ill. 2d 196, 197, 279 N.E.2d 353; People v. Eubank, 46 Ill. 2d 383, 394, 263 N.E.2d 869. However, in view of the position stated in dissenting opinions in Amerman and in People v. Luckey, 42 Ill. 2d 115, 245 N.E.2d 769, we will give consideration to this issue which we believe may be readily disposed of.

In Davis, the Supreme Court held unconstitutional that portion of the statute which forbids unlawful use of narcotic drugs. The court held that this statute would punish a person merely for his status as an addict without the necessity of proof of any overt act of anti-social behavior. In later decisions, the court has expressly refused to extend the holding in Robinson to other situations. In People v. Nettles, 34 Ill. 2d 52, 213 N.E. 2d 536, the court described both Robinson and Davis as holding "\*\*\*invalid a penal law which involved no voluntary act." (See 34 Ill. 2d at 56.) The court expressly refused to expand this theory to invalidate the statute making possession of narcotics criminal when applied to a known addict. Note additional authorities cited to this precise point in People v. Myers, 52 Ill. 2d 258, 259, 260, 287 N.E.2d 672.

In determining whether the assailed statute is subject to attack upon the ground that it is vague and overly broad, we must consider its application to the indictment in the case before us. The possibility of imagining extreme circumstances in which there might conceivably be an unconstitutional application of this statute, does not support defendant's argument. (See City of Chicago v. Fort, 46 Ill. 2d 12, 17, 262 N.E.2d 473.) The test of constitutional definiteness is that the statute must give reasonably



adequate notice as to what conduct will subject a person to criminal penalties. There must be sufficient definiteness so that the person affected will reasonably know the nature of the misconduct which is proscribed by the enactment. (See People v. Reed, 33 Ill. 2d 535, 538, 213 N.E.2d 278.) We do not believe that the statute in question is subject to this criticism as regards the case before us and we accordingly reject defendant's contention in this regard.

Defendant's next point is directed to the sufficiency of the indictment. His theory is that the indictment is defective because it failed to allege that defendant acted knowingly in dispensing heroin. It is correct, as the State points out, that defendant made no motion to quash the indictment, no motion in arrest of judgment and did not raise this point in a post trial motion. Consequently, this point, raised for the first time in this court, has legal validity "\*\*\*only if the indictment fails completely to charge commission of a crime so that it is void." People v. Bradley, 12 Ill. App. 3d 783, 299 N.E.2d 99 and additional cases there cited.

Defendant's point, however, is completely refuted in People v. Bussie, 41 Ill. 2d 323, 243 N.E.2d 196. There, defendant was charged in two indictments, consolidated for trial, with unlawful sale and unlawful possession of a narcotic drug under the same section of the statute involved in the case before us. Both indictments were attacked on the ground that neither alleged that the violation was committed knowingly. The Supreme Court held that both of these indictments were sufficient and valid even though lacking the allegation that the defendant had committed the violation with knowledge. The rationale of this decision is the established principle that, where the indictment charges an offense in the language of the statute, it is sufficient where





the words used in the statute apprise the accused with reasonable certainty of the offense charged. (See People v. Harvey, 53 Ill. 2d 585, 588, 294 N.E.2d 269.) The result reached in Bussie is also based upon the authority of People v. Mills, 40 Ill. 2d 4, 237 N.E.2d 697. The court there held that an indictment for possession of a narcotic drug under the same section of the statute was valid although it did not allege that defendant had knowledge of the nature of the drug.

Defendant seeks to differentiate Mills and Bussie on the theory that both cases involved the crime of possession of a narcotic drug and the Uniform Narcotic Drug Act expressly defines possession of the drug as requiring knowledge of its nature. This is not quite accurate because the section of the statute which defendant cites and relies upon defines possession as "a voluntary act" in situations where "\*\*\*\*the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his possession." (Ill. Rev. Stat. 1967, ch. 38, par. 4-2.) This argument is further completely overcome by the fact that one of the indictments held valid in Bussie was for sale of a narcotic drug. Furthermore, a careful reading of Mills, with particular attention to the citation of cases from other jurisdictions, convinces us that the Supreme Court would reach the same result as to validity of a similar indictment charging dispensing of the drug. See People v. Mills, 40 Ill. 2d at 11, 12.

Defendant's next point is directed to the failure of the trial court to instruct the jury that knowledge was an essential element of the offense. The State urges that we should not consider this point because the record does not contain all instructions considered at trial, both given and refused. (See People v. Daily, 41 Ill. 2d 116, 121, 242 N.E.2d 170.) It is correct





that neither the abstract of record nor the record itself reflects instructions refused by the trial judge. However, defendant concedes that he did not tender an instruction defining knowledge but instead urges that it was the duty of the court to instruct the jury sua sponte. (People v. Davis, 74 Ill. App. 2d 250, 221 N.E.2d 63.) We will, therefore, give this point due consideration in conjunction with defendant's next contention that there was a reasonable doubt as to his knowledge of the nature of the drug.

The governing principle here has been authoritatively stated by the Supreme Court in People v. Chupich, 53 Ill. 2d 572, 579, 295 N.E.2d 1:

"The State concedes that knowledge is an element of the offense, and the defendant argues that failure to so instruct the jury requires reversal. No such instruction was requested. It has been held that where a defendant's knowledge of the nature of the substance involved has been the subject of genuine dispute, failure to instruct the jury that knowledge must be proved is reversible error. (People v. Lewis (1969), 112 Ill. App. 2d 1, 11; People v. Castro (1971), 1 Ill. App. 3d 537.) Other cases have held that where the defendant's knowledge is proved beyond a reasonable doubt, failure to instruct the jury on this element was harmless error. People v. Keating (1971), 2 Ill. App. 3d 884, 890; cf. People v. Truelock (1966), 35 Ill. 2d 189 (possession of narcotics)."

The application of this clear principle to the record before us thus requires consideration of defendant's next contention regarding the evidence of his knowledge of the nature of the drug in question. Examining the evidence as briefly summarized above, we find repeated testimony that defendant suggested and then discussed giving Kahn one ounce of heroin in exchange for a quantity of marijuana in the suitcase of which Kahn had possession. At the meeting between the parties, defendant gave Kahn, in a surreptitious manner, a sample of the heroin so that Kahn could test it and make sure as to its identity. Defendant even told Kahn



specifically that the material was pure. Defendant himself admitted that he knew that the substance he was to transfer was heroin before he reached the airport with his brother and Bazile. In the light of this evidence, defendant's argument regarding lack of knowledge and necessity for an instruction defining knowledge has no significance.

Defendant cites and relies upon People v. Lott, 24 Ill. 2d 188, 181 N.E.2d 112. In Lott, the defendant was found guilty of selling, possession of and dispensing marijuana. However, the State's own case showed that the substance involved was within a specified exception in the statute defining marijuana. No such situation exists here. On the contrary, there is strong evidence beyond genuine dispute as to defendant's full knowledge that he had possession of heroin. Furthermore, in People v. Pigrenet, 26 Ill. 2d 224, 186 N.E.2d 306, the court inferred knowledge of possession of heroin from the fact that when the police were about to arrest the defendant, he attempted to divest himself of four packages of the drug. The Supreme Court pointed out that mere possession of a narcotic, amply shown by the record in the case at bar, "\*\*\*constitutes substantial evidence to sustain a finding that the possessor knew its nature." (See 26 Ill. 2d at 227.) Pigrenet was recently followed by the Supreme Court in People v. Harris, 52 Ill. 2d 558, where possession of accessories used in administering narcotics and "collapsed veins" in defendant's arm were held relevant to the question of knowledge. See 52 Ill. 2d at 560, 561.

Nor do we find, as defendant urges, that the jury in the case before us returned inconsistent verdicts when it found defendant guilty of dispensing heroin and not guilty of possession of marijuana. We find these verdicts to be both consistent and proper. There is evidence beyond reasonable doubt concerning dispensing of the one drug and no evidence that defendant ever



had possession of the suitcase containing the marijuana. In this regard, the State argues that defendant's position is inconsistent and, therefore, untenable because he contends that he was entrapped and simultaneously urges that he had no knowledge of the nature of the drug involved. It is legally and logically correct "\*\*\*\*that one may not at once deny the commission of the offense and claim entrapment." (People v. Fleming, 50 Ill. 2d 141, 144, 277 N.E.2d 872.) However, we will consider this issue on the merits which brings us to determination of the next point raised by defendant that the record fails to show beyond a reasonable doubt that he was not entrapped into unlawfully dispensing heroin.

It is legally correct that where the "\*\*\*\*defendant presents some evidence to raise the issue of entrapment, 'the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all other elements of the offense.' Ill. Rev. Stat. 1969, ch. 38, par. 3-2(b)." People v. Dollen, 53 Ill. 2d 280, 284, 290 N.E.2d 879.

It is true, as defendant points out, that Kahn used an assumed name in dealing with him. However, it is also correct that this record shows beyond reasonable doubt that defendant was engaged in marijuana transactions and his predicament, as reflected in the case at bar, arose from his desire to obtain return of a quantity of this drug which had been lost. Defendant urges that the State initiated the idea of exchange of the marijuana for heroin. However, there is strong evidence that defendant was the first to ask Kahn in a telephone conversation if Kahn wanted "something harder" and then to suggest heroin. In view of evidence of this type, the statement by defendant, that he was told by Bazile, whom he knew to be a police officer, that everything would be all right and that Kahn (sometimes referred to as Cannon) would be the one to be arrested, has little substance or persuasive power.







The verdict of the jury is supported by evidence beyond a reasonable doubt that defendant intended to commit the crime with which he was charged and the very most which he can urge in this case is that the State merely afforded him an opportunity to commit a criminal act for the purpose of obtaining possession of the marijuana. (Note People v. Dollen, 53 Ill. 2d 280, 283, 284, 290 N.E.2d 879.) In a situation of this type, the verdict of the jury so strongly supported by the evidence may not be set aside by this court. There is no reasonable doubt of defendant's guilt. People v. Clark, 52 Ill. 2d 374, 387, 288 N.E.2d 363.

Defendant next directs our attention to the closing argument of the prosecutors. The jury was told, "There has been evidence that this is either a national or international dope ring." The court sustained objection made by defendant's counsel to this statement and directed the jury to disregard it. Outside of the presence of the jury, the prosecutor urged that the marijuana had been shipped from California to New Jersey and that over 100 pounds of the substance was involved. He also referred to evidence that the shipment had originated in Mexico. The trial court ruled that use of the word "international" was objectionable and he then advised the jury that objection had been sustained to the use of that term.

In this regard, defendant cites and relies upon People v. Romero, 36 Ill. 2d 315, 223 N.E.2d 121. Defendant urges that there the Supreme Court reversed a conviction for unlawful sale of heroin primarily because the prosecutor spoke of defendant as one of the "big fellows" of the drug trade. However, Romero was actually reversed for more reasons than one. The court held that the arguments of the prosecutor, including an appeal to prejudice against the defendant because of his place of birth and national origin, were so improper and prejudicial as to require



reversal of the conviction even though defense counsel had not objected. (See 36 Ill. 2d at 318, 319, 320.) In the case before us, there was an objection which was partly sustained by the court and the jury was carefully instructed that they were to disregard the offending argument. We cannot agree that this constituted reversible error under all of the circumstances disclosed by this record.

At a later point in the argument, the prosecutor told the jury, "In the annals of crime most other crimes are paled into significance [sic], by the filth, the vermin and the sorrow that narcotic traffic brings to all of us." The prosecutor also stated to the jury, "You're affecting your own fate by letting vermin like Owen Phifer loose in our society." But, careful examination of the record shows that counsel for defendant did not object to this language in either instance. The use of intemperate language of this kind by the prosecution must be strongly condemned. However, reviewing courts have most frequently held that the failure of counsel for defendant to object to improper final argument constitutes a waiver of the point. People v. Hampton, 44 Ill. 2d 41, 46, 253 N.E.2d 385.

Reviewing courts will consider allegedly prejudicial arguments to which no objection was made only if it affirmatively appears that, as a result thereof, a defendant was deprived of a fair trial. (People v. Dailey, 51 Ill. 2d 239, 243, 244, 282 N.E. 2d 129; People v. Romero, 36 Ill. 2d 315, 320, 223 N.E.2d 121.) The reviewing courts of Illinois have consistently and repeatedly held that the mere occurrence of improper remarks does not by itself constitute reversible error. The record must affirmatively demonstrate an additional element. This has been described in varying language by the cases. It has been stated that the argument must "constitute a material factor in the conviction" (People v. Clark, 52 Ill. 2d 374, 390, 288 N.E.2d 363); must have resulted



in "substantial prejudice to the accused" (People v. Nilsson, 44 Ill. 2d 244, 248, 255 N.E.2d 432) or there must be a showing that "the verdict would have been different had the improper closing argument not been made\*\*\*." (People v. Trice, 127 Ill. App. 2d 310, 319, 262 N.E.2d 276.) In the absence of this additional factor, we cannot treat the assailed argument as reversible error.

Defendant also relies upon and quotes from People v. Dukes, 12 Ill. 2d 334, 146 N.E.2d 14. Actually the conviction there was reversed for the admission of incompetent evidence and also because of inflammatory and prejudicial argument. As the court specifically pointed out, Dukes was a case in which the jury had imposed the death penalty for murder. (See 12 Ill. 2d at 344.) In addition, it appears from the opinion that repeated objections by defense counsel to the prejudicial argument were overruled. Note the subsequent differentiation of Dukes for this reason in People v. James, 4 Ill. App. 3d 1042, 1050, 1051, 282 N.E.2d 760, in which this court contrasted the situation there with a case in which an objection was sustained and the jury told to disregard the improper material.

Defendant urges in his reply brief and also in oral argument that, since the jury acquitted him on one charge and convicted him of another, it should be presumed that the issue of guilt was close. On the contrary, the assertion is equally valid and convincing that the fact that the jury acquitted defendant on the charge of possession of marijuana indicates that the allegedly prejudicial argument had no effect upon their deliberations or their verdict.

Defendant finally urges that the sentence of 10 years to 10 years and a day is excessive. The State agrees that defendant should be resentenced. The Uniform Narcotic Drug Act has now





been supplanted by the Illinois Controlled Substances Act. Compare Ill. Rev. Stat. 1967, ch. 38, pars. 22-1 to 22-55 with Ill. Rev. Stat. 1971, ch. 56-1/2, pars. 1100 to 1603 inclusive. Under former legislation, the trial court had no alternative other than imposing a minimum sentence of 10 years (Ill. Rev. Stat. 1967, ch. 38, par. 22-40.) On the contrary, under present existing legislation, since less than 30 grams of heroin is involved, defendant was guilty of a Class 2 felony with possibility of a fine not more than \$25,000. Compare Ill. Rev. Stat. 1971, ch. 56-1/2, pars. 1401(a)(1) and (b).

In this situation, the Illinois Unified Code of Corrections governs the sentence (People v. Chupich, 53 Ill. 2d 572, 584, 295 N.E.2d 1; People v. Harvey, 53 Ill. 2d 585, 589, 590, 294 N.E.2d 269.) The penalty for the crime of which defendant stands convicted is an indeterminate penitentiary sentence of one to 20 years (Ill. Rev. Stat. 1971, ch. 38, pars. 1005-8-1(b)(3) and (c)(3).) In this case, we prefer that a proper sentence be entered by the trial court upon due consideration of all pertinent factors. See People v. Kennel, 13 Ill. App. 3d 446, \_\_\_\_ N.E. 2d \_\_\_\_.

The judgment appealed from is accordingly affirmed and the cause is remanded to the circuit court of Cook County for resentencing of the defendant after conducting a sentencing hearing as provided in section 5-4-1 of the Unified Code of Corrections, Ill. Rev. Stat. 1972 supp., ch. 38, par. 1005-4-1.

Judgment affirmed and cause  
remanded for resentencing.

BURKE, P.J., and EGAN, J., concur.



Respondent-Appellee.

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY.

HONORABLE  
JOSEPH A. POWER,  
PRESIDING.

PER CURIAM \* (FIRST DIVISION, FIRST DISTRICT):

The pro se petition for writ of habeas corpus filed by Leroy Macklin (relator) was dismissed on motion of the respondent, relator appealed. The public defender of Cook County has filed a motion in this court for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, in which counsel states that the trial court committed no error in the dismissal of the habeas corpus petition and that, in effect, the appeal is without merit.

The pro se habeas corpus petition alleged that relator was released on parole from the penitentiary in August, 1971; that he was arrested on an armed robbery charge in February, 1972; that the parole authorities placed a "Hold for Parole Violation" warrant against him while he was in the Cook County Jail; that bond had been set on the armed robbery charge; that he was not advised of the results of a parole violation hearing held in May, 1972; and that he was unable to secure his release on bond from the armed robbery charge due to the parole violation warrant against him; the petition requested either relator's discharge from the Cook County Jail or his release on bond.

Counsel was appointed for relator, and approximately one month later, a hearing was held on the respondent's motion to dismiss the pro se habeas corpus petition. At that hearing, the assistant attorney general argued that relator's position was in fact that he had no hearing on his alleged parole violation, whereas



relator in fact had a preliminary hearing in that regard in May, 1972; that a full hearing would be held in the matter as soon as the parole board met on the matter; and that relator's relief lay in mandamus and not in habeas corpus. Relator's counsel argued that relator was not seeking a hearing on the parole violation; that he was denied due process of law under the holding of Morrissey v. Brewer, 408 U.S. 471, in light of the failure to have provided him with a hearing; and that he was entitled to relief under habeas corpus. In dismissing the pro se habeas corpus petition, the court noted that relator should file a mandamus action.

It appears that subsequent to the dismissal of the pro se petition, relator entered a plea of guilty to the armed robbery charge and was sentenced to a term of five years to five years and one day in the Illinois State Penitentiary. Relator was forwarded copies of appellate counsel's motion for leave to withdraw and its supporting brief to his address at the Cook County Jail, but those papers were subsequently returned to this court. Relator was thereafter forwarded those papers to his address at the Illinois State Penitentiary at Joliet, and he was allowed additional time to file any points he desired in support of this appeal; relator has not responded.

We are in agreement with appellate counsel that the instant appeal is frivolous and without merit. Subsection 2 of section 21 of the Habeas Corpus Act provides that where a person is in custody under a final judgment of a court of competent jurisdiction, or of any execution issued upon such judgment, he is not entitled to discharge under the terms of the act unless the time during which he may be legally detained has expired. (Ill. Rev. Stat. 1971, ch. 65, par. 21(2).) In the instant case, it appears that relator is no longer in the custody of the Cook County Jail but that he has been lawfully incarcerated in the Illinois State Penitentiary





upon a plea of guilty to a felony charge and that the term of years imposed upon such plea has not expired. Relator is therefore not entitled to relief provided by the Habeas Corpus Act under the circumstances.

Upon review of the instant record in discharge of our duty under the Anders decision, this court has found one matter which raises an issue but which, in final analysis, will not support a fully developed appeal in this case.

The pro se habeas corpus petition reveals that relator was not allowed such hearing on the question of his alleged parole violation as is required by Morrissey v. Brewer, 408 U.S. 471; Morrissey holds that a parolee must be accorded due process of law on a revocation of his parole, which includes a hearing within a reasonable time and at a place reasonably near the location of the violation. That relator had been entitled to such hearing and that he had an action in mandamus to attempt to secure same was admitted by both the trial court and respondent's counsel at the hearing on respondent's motion to dismiss the petition for writ of habeas corpus. (People ex rel. Johnson v. Pate, 47 Ill. 2d 172, 177, 265 N.E. 2d 144 (cert. den., 402 U.S. 976).) However, it does not appear that relator is at this time being denied the hearing on the violation of parole question, and in fact appellate counsel does not now request that such hearing be granted or that relator's petition be allowed to stand as a petition for writ of mandamus. (See, e.g., People ex rel. Lick v. Fields, No. 57697, August Term, 1973; and People ex rel. Petraborg v. Fields, No. 56721, October Term, 1973.) There appears no reason to entertain the question of whether relator is currently entitled to a hearing on the parole violation, and that question would therefore not support an appeal in this case. No other grounds have been found by this court upon independent review of the record to support an appeal in this case.



For these reasons, the motion of the public defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed, and the judgment of the circuit court of Cook County is affirmed.

Motion allowed; judgment affirmed.

\*Egan, J., did not participate.



57126



STEVO NIKOLIC,	)	APPEAL FROM THE
Plaintiff-Appellant,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.	)	
	)	
CITY OF CHICAGO, a municipal	)	HONORABLE
corporation,	)	LESTER JANKOWSKI,
Defendant-Appellee.	)	JUDGE PRESIDING.

Mr. JUSTICE DOWNING delivered the opinion of the court:

Stevo Nikolic, hereinafter referred to as plaintiff, brought an action against the City of Chicago to recover for personal injuries he had allegedly sustained on January 29, 1969, while walking on a public city sidewalk, when he stepped on a metal manhole cover set in the sidewalk, the cover tilted, and plaintiff fell into the opening.

Within six months of the alleged injuries, plaintiff filed with the clerk of the City of Chicago a "Notice of Claim for Personal Injuries," and, within one year from the date of the alleged injuries, filed his lawsuit against the City. After having filed its answer, the City presented to the court below a motion to strike and dismiss plaintiff's cause, claiming that plaintiff had failed to meet the requirements of notice to the City of the alleged personal injuries pursuant to chapter 85, section 8-102 of the 1965 Illinois Revised Statutes, the Local Governmental and Governmental Employees Tort Immunity Act. The City's specific ground for support of its motion was that plaintiff's notice had failed to describe the general nature of the accident, a necessary part of the required notice under the statute cited.

Upon the conclusion of oral argument on the City's motion, the trial court sustained the motion, ordered the complaint stricken, and dismissed the cause. Plaintiff appeals.





The sole issue presented to this court for resolution is whether or not plaintiff's "Notice of Claim for Personal Injuries" met all the requirements set forth in section 8-102 of chapter 85, because, in fact, the notice nowhere gave the general nature of the accident.

Section 8-102 provides, in pertinent part, that in an action against a local public entity "Within 6 months from the date that the injury \* \* \* was received \* \* \* any person who is about to commence any civil action for damages \* \* \* must personally serve \* \* \* a written statement \* \* \* giving \* \* \* the general nature of the accident \* \* \*." (Emphasis supplied.) The effect of failure to serve notice as required in section 8-102 is set forth in section 8-103, which reads:

"If the notice under Section 8-102 is not served as provided therein, any such civil action commenced against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury, shall be dismissed and the person to whom such cause of injury [sic] accrued shall be forever barred from further suing."

In Rapacz v. Township High School Dist. No. 207 (1st Dist. 1971), 2 Ill. App. 3d 1095, 278 N.E.2d 540, we upheld the lower court's dismissal of a complaint for personal injuries solely upon the ground that the notice of the claim contained a typographical error with reference to the date of the alleged accident. We said in Rapacz, at page 1099:

"The courts of this jurisdiction have traditionally and consistently held that statutes requiring the giving of notice of injuries or accidents to municipalities of every kind are strictly construed and must be followed with complete adherence to each prescribed detail. Where required by the statute, as in the case at bar, dismissal of the suit must necessarily result from a defect in the notice."

We then went on in the Rapacz opinion to cite many cases which illustrate the longtime adherence to the stated rule.



After a reading of the record and a thorough review of the notice plaintiff served upon the City clerk, we find that the notice was insufficient to meet the statutory requirements of section 8-102 in that it failed to include a statement concerning the general nature of the accident alleged to have taken place. In so finding, we are not unmindful of the cases which plaintiff urges in support of his contention that where a substantial attempt to comply with the notice provisions of the statute is made, the notice will be deemed sufficient. We find those cases to be clearly distinguishable from the case at bar.

Therefore, the court below acted with propriety in dismissing plaintiff's cause under the authority of section 8-103 of chapter 85.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

STAMOS, P.J., and HAYES, J., concur.

(Abstract only.)



No. 73-240

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT



PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Appellee,	)	Appeal from the Circuit Court of
	)	Saline County.
vs.	)	
	)	
FRANK L. RAKAS,	)	Honorable Peyton H. Kunce,
	)	Judge Presiding.
Appellant.	)	

PER CURIAM:

Appellant pleaded guilty to an indictment charging theft over \$150 and was sentenced to two to six years' imprisonment. The Illinois Defender Project, now the office of the State Appellate Defender, was appointed counsel on appeal.

The Appellate Defender has filed a motion and memorandum pursuant to Anders v. California, 286 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, alleging that there is no merit to the appeal and requesting leave to withdraw as counsel on appeal. The appellant was given proper notice, and granted an extension of time in which to file pro se briefs or memoranda raising issues to be considered in this appeal; he has failed to respond.

We have reviewed the record; the indictment was properly framed and the record of the proceedings on the plea of guilty demonstrates sufficient compliance with Supreme Court Rule 402. Further, the sentence is not excessive in view of the appellant's prior history and the nature and circumstances of the offense.

Motion to withdraw allowed; judgment affirmed.

Justice Carter not participating.

PUBLISH ABSTRACT ONLY.





No. 73-239

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT



PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Saline County.
vs.	)	
	)	
BOBBY JOE ALEXANDER,	)	Honorable Peyton H. Kunce,
	)	Judge Presiding.
Defendant-Appellant.	)	

PER CURIAM:

The defendant was indicted for the offense of theft over \$150 and pled guilty to that offense. The State Appellate Defender was appointed counsel on appeal.

The Appellate Defender has filed a motion pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 alleging that there is no merit to the appeal and requesting leave to withdraw. The defendant was given proper notice and granted an extension of time in which to file documents supporting his appeal; he has failed to respond.

We have inspected the record and have found no potential ground for appeal. The indictment was properly framed and the record demonstrates sufficient compliance with the requirements of Supreme Court Rule 402 in the acceptance of the guilty plea.

Motion to withdraw allowed; judgment affirmed.

Justice Carter not participating.

PUBLISH ABSTRACT ONLY.



18 F.A. 443



No. 73-253

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Appellee,	)	Appeal from the Circuit Court of
	)	Williamson County.
vs.	)	
	)	
CHARLES DUNNING,	)	Honorable William A. Lewis,
	)	Judge Presiding.
Appellant.	)	

---

PER CURIAM:

The appellant was convicted pursuant to his plea of guilty to the offense of burglary. The State Appellate Defender was appointed counsel on appeal.

The Appellate Defender has filed a motion pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 alleging that there is no merit to the appeal and requesting leave to withdraw. The appellant was given proper notice and granted an extension of time in which to file documents supporting his appeal; he has failed to respond.

We have inspected the record and have found no potential ground for appeal. The information was properly framed and the record demonstrates sufficient compliance with Supreme Court Rules 401 and 402 in the waiver of indictment and acceptance of the plea of guilty.

Motion to withdraw allowed; judgment affirmed.  
Justice Carter not participating.

PUBLISH ABSTRACT ONLY.



No. 73-273

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT



---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Madison County.
vs.	)	
	)	
CHARLIE KING YOUNG, JR.,	)	Honorable Victor J. Mosele,
	)	Judge Presiding.
Defendant-Appellant.	)	

---

PER CURIAM:

The defendant was indicted for the offense of armed robbery. He pled guilty to that charge and was sentenced, pursuant to a plea agreement, to serve a minimum of six and a maximum of eighteen years in the penitentiary. The State Appellate Defender was appointed counsel on appeal.

The Appellate Defender has filed a motion pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1369, 18 L.Ed.2d 493 alleging that there is no merit to the appeal and requesting leave to withdraw. The defendant was given proper notice and granted an extension of time in which to file documents supporting his appeal; he has failed to respond.

We have inspected the record and have found no potential ground for appeal. The indictment was properly framed, the record demonstrates sufficient compliance with the requirements of Supreme Court Rule 402 in accepting the guilty plea and there were sufficient aggravating circumstances to justify the sentence imposed.

Motion to withdraw allowed; judgment affirmed.

Justice Carter not participating.

PUBLISH ABSTRACT ONLY.









Any person in the custody of the Department of Corrections on the date this Section becomes operative who, under prior law, would have been eligible for parole sooner than provided in this Section, shall have his parole eligibility determined under such prior law; otherwise his eligibility shall be determined under this Article and Article 8 of Chapter V. Ill.Rev.Stat. ch. 38, sec. 1003-3-3(c).

Section 1003-3-3(c) concerns only the question of eligibility for parole. It is not a means by which a person whose conviction was final before the Code became effective can have his sentence modified.

A court has jurisdiction to grant habeas corpus relief after conviction when the original judgment of conviction was void or where something has happened since its rendition to entitle the prisoner to release. *People ex rel. Lewis v. Frye*, 42 Ill.2d 58, 245 N.E.2d 483. Because neither of these elements is present, and the petitioner's maximum term has not expired or been lawfully terminated, the circuit court properly dismissed the habeas corpus petition. *People ex rel. Jefferson v. Brantley*, 44 Ill.2d 31, 253 N.E.2d 378.

For the foregoing reasons the judgment of the circuit court of St. Clair County is affirmed.

Motion to withdraw allowed; judgment affirmed.

Justice Carter not participating.

PUBLISH ABSTRACT ONLY.



18 I.A. 456<sup>3d</sup>

72-181.

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

April 3, 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

FILED

APR 3 - 1974

LOREN I. STANTON, Clerk  
Appellate Court, 2nd District

JOHN SNYDER,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the Circuit
	)	Court of Kane County,
v. ' .	)	Illinois.
	)	
CLARENCE TANNER,	)	
	)	
Defendant-Appellee.	)	

---

Mr. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

In a jury trial, plaintiff sought to recover property damages caused by defendant. At the close of the case in chief, the court found that plaintiff had failed to prove damages and directed a verdict in favor of defendant.

On appeal, plaintiff takes issue with the court's ruling on the admissibility of exhibits offered, its fairness in directing a verdict and its comments to counsel in the presence of the jury. Because the jury was directed in its verdict, we need not reach the last issue.

On July 28, 1969, defendant, while backing his car from a diagonal parking space in Geneva, Illinois, collided with the rear wheels of a truck-trailer owned by plaintiff and operated by his employee. At trial, eight exhibits were marked for identification;





none were received into evidence and plaintiff contends the court erred in not allowing the introduction of those offered.

Plaintiff has failed to include within the record any of the exhibits. This omission is sufficient reason for dismissing the appeal. (People ex rel. McDonough v. Sherwin, 361 Ill. 403 (1935); Honey v. Honey, 3 Ill. App. 3d 948 (1972).) We prefer, however, to dispose of the case on its merits and, with that intent, have carefully reviewed the report of proceedings to ascertain whether there is substance to any of plaintiff's remaining contentions.

Plaintiff identified Exhibit 1 as a statement of his monthly earnings received a year prior to the accident and at a time when he was not self-employed. Since the instant case concerned only property damage, the relevancy of the exhibit was justifiably questioned and plaintiff never attempted to introduce it into evidence. Exhibit 2 was an estimate of repairs which, plaintiff admitted, included items of repair other than those occasioned by the accident. It was not established that the amount thereon was paid and the estimate was not offered into evidence. Exhibit 3 was not identified but from the record we speculate that it was another estimate of repair. Again, no testimony of payment was established. Exhibit 4 was not identified; neither are we able to determine what it purported to represent. Exhibits 5 and 6 were identified as invoices, dated four months prior to the accident, for tires. There was no testimony to indicate payment nor was any foundation laid to establish that the tires on plaintiff's truck had been damaged in the accident. These exhibits were not offered into evidence. Exhibit 7 consisted of photographs of plaintiff's truck, taken sometime subsequent to the instant accident and after the vehicle was towed from a "rail" in Pennsylvania. No foundation or relevancy for this exhibit was established. A policeman who investigated the accident in question testified in plaintiff's behalf and stated his observations regarding the damage to the truck. Upon completion of his direct testimony, plain-



tiff moved to introduce the officer's written accident report, Exhibit 8, into evidence. Objection to its admittance was sustained by the court.

Plaintiff testified to the damage the truck sustained as a result of the collision. He did not, however, testify to the difference in the truck's value before and immediately following the accident nor to the cost of repairs.

Thus, our review of the record indicates that certain exhibits were never offered into evidence, some were offered without proper foundation and still others were offered without any foundation for their admittance. We conclude, for the reasons stated, that the trial court properly excluded the exhibits offered. We also find that since plaintiff failed to establish any monetary value for the damages to his vehicle, the jury could not, without speculation, have reached a proper verdict.

The order directing the verdict in favor of the defendant is affirmed.

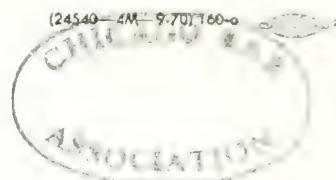
Judgment affirmed.

GUILD, P.J. and SEIDENFELD, J., concur



18 I.A. <sup>3d</sup> 439

(24540-4M-9-70) 160-0



## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 4th day  
of April A. D. 1974, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:





General No. 12168

Agenda No. 73-158

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
v.	)	Vermilion County
	)	
DOROTHY REED,	)	
	)	
Defendant-Appellant	)	

---

Mr. PRESIDING JUSTICE SMITH delivered the opinion of the court:

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with Anders v. State of California, 365 US 738, 18 L Ed 2d 493, 87 S Ct 1396. The motion was continued for 60 days for the defendant to file any other further or additional suggestions and notice to her of this opportunity was given. None were filed.

The defendant was charged in one count with the offense of aggravated battery and in the second count with the offense of disorderly conduct. Counsel was appointed and a plea of guilty was entered pursuant to a plea bargaining agreement. The agreement was that she would plead guilty to Count I,



Count II would be dismissed and punishment would be limited to a maximum of 1 year. The State's attorney stated that the factual basis for the plea was that the defendant, during the course of an argument with another, "Exhibited a knife and stabbed the victim several times." The defendant agreed that the statement of facts was true and correct.

The trial judge then explained the nature of the charge, minimum and maximum penalties, and the defendant's rights under Supreme Court Rule 402 fully and in detail. On this record there is unquestionably a substantial compliance with Supreme Court Rule 402. A petition for probation was filed and denied.

The only other justiciable issue was whether or not the trial court abused its discretion in denying the defendant's application for probation. The record indicated that the defendant had a battery conviction in 1964, a petty theft conviction in 1968, and had been arrested for drunkenness in 1959, 1963, and 1965. Considering the serious nature of the aggravated battery and the defendant's past record, we cannot say that the trial court abused its discretion in denying probation. The sentence was within the statutory limits and within the plea bargaining agreement. Accordingly, we conclude that a further review of this case would be frivolous and without merit.

Accordingly, the motion of counsel to withdraw is allowed and the judgment of the trial court is affirmed.

Affirmed.

CRAVEN and SIMKINS, JJ., concur.



## UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     )   ss.  
Second District     )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable L. L. RECHENMACHER, Justice  
                 LOREN J. STROTZ   , Clerk  
                 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit:   On  
April 9, 1974       the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND JUDICIAL DISTRICT

**FILED**  
APR 9 1971

PEOPLE OF THE STATE OF  
ILLINOIS,

Plaintiff-Appellee,

v.

JESSE JAMES DuPREE,

Defendant-Appellant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

LOREN J. SIKOTZ, Clerk pro tem  
Appellate Court, 2nd District

Appeal from the Circuit Court  
of Winnebago County, Illinois.

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

On April 7, 1971, defendant entered a plea of guilty to the charge of theft and was placed on probation for five years. This is an appeal from a judgment revoking defendant's probation.

At the hearing to revoke it was alleged that on December 7, 1971, the defendant violated his probation by robbing and attempting to murder one Ray Timmons. Timmons and defendant met in a chance encounter at the Boston Lounge, a restaurant in Rockford, Illinois. They were not previously acquainted. Timmons testified he had a number of drinks at several lounges previous to meeting the defendant at the Boston Lounge. After talking with the defendant and drinking a cup of coffee with him at the Boston Lounge, they entered his (Timmons's) car and he drove to a parking lot to which he was directed by defendant. At this point the defendant asked for his wallet, remarked there was not much money in it and then proceeded to stab Timmons several times, pulled him from the car,





forced him into the trunk of his (Timmons's) automobile, drove the car onto some railroad tracks and left. Timmons managed to free himself and stagger to the Sheriff's office. Before the car could be located a train hit the car and pushed it from the tracks, damaging the rear end extensively.

A day or two later a detective showed a photograph of the victim and the defendant to the waitress who had served the two at the Boston Lounge and the girl who was at the cash register when they paid their check. He asked the girls whether the two men in the pictures were the two men they had seen together a few days before. According to the testimony at the hearing the two girls did identify the two from the photographs. (There is some dispute about whether two photographs were shown to the girls, or only one. The testimony at the trial indicated two photographs, one each of the defendant and the victim, were exhibited to both girls.)

Subsequent to the incident defendant fled to Alabama and was arrested there on a fugitive warrant. When apprehended he was advised of his Miranda rights and the officers testified he asked them if there were any colored witnesses against him, as he had seen one Archie Hawks that night. They also testified that he stated that it wasn't a robbery, that he thought it would more rightly be classified as an assault.

During the investigation of the incident a search warrant had been obtained and a brown sweater with blood stains on it had been found in defendant's apartment. At the hearing to revoke probation, Ray Timmons could not identify the defendant. However, he testified his assailant was a male Negro and was wearing a brown sweater or sweater shirt. This



garment was received in evidence as People's Exhibit # 4. Timmons identified the sweater, saying "this looks like the sweater that this person had on." A crime laboratory analyst testified that the blood on the sweater was of the same type as Timmons's (Type A).

At the conclusion of the testimony the trial court ruled that defendant's probation should be revoked and sentenced him to a term of not less than two nor more than seven years in the penitentiary.

In this appeal the defendant contends: (1) the procedure of the Rockford Police of showing the identifying witnesses only one photograph of the defendant for identification purposes was highly improper and suggestive and their identification of the defendant made under such circumstances is not in accordance with due process of law; (2) the State should have been required to provide the defendant an opportunity for a jury trial at the hearing to revoke his probation and should have been required to prove defendant's guilt beyond a reasonable doubt at such hearing, rather than by a mere preponderance of the evidence, and (3) in any event, even if the burden of proof on the State at the probation revocation hearing required only a preponderance of the evidence, the State did not even sustain this burden.

The defendant cites three cases in support of his first contention regarding identification procedure. Simmons v. United States (1968), 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967, does contain some general language relative to the dangers of identification by photograph and points out that where only one or two photographs are shown to the witness and especially where the witness is informed that such person is the suspect the witness is likely to remember the picture and make a misidentification at the sub-



sequent lineup or courtroom identification. However, the court went on to say, p. 1253:

"Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

In the Simmons case the court held the identification by photograph was justified by the fact that the fugitives were at large. In the case under consideration here, the same is true, the defendant having fled to Alabama, in which state he was apprehended some weeks after the crime.

The case of People v. Holiday (1970), 47 Ill. 2d 300, 265 N. E. 2d 634, cited by the defendant is not in point. In addition to the fact that the crime occurred under circumstances giving the identifying witness only a brief glance at the accused and at night, there was the additional consideration in the Holiday case that the accused was in custody and could have been viewed in a lineup rather than by showing the identifying witness a single photograph. Judging Holiday strictly on its merits, in line with the Simmons case, the Illinois Supreme Court remanded for the purpose of conducting a hearing on





the admissibility of the identification testimony of the identifying witness.

The case of People v. Waters (1971), 2 Ill. App. 3d 429, 275 N. E. 2d 472, is not helpful to the defendant. In that case the conviction was upheld on the basis of identification made after prolonged opportunity to view the accused who remained in the home of the victims for several hours, terrorizing and abusing them. The court felt that the Holiday case, cited by the defendant in the Waters case, was not applicable in its facts and it seems to us clearly distinguishable.

In the instant case, the police were investigating a robbery and an attempted murder. The investigating police officers had only meager clues and it was essential for them to act quickly. Actually, the waitress to whom the photos were shown would have good reason to remember the defendant. She served the two men and in that way had a good opportunity to observe them. The cashier was also shown the photo and she recognized the defendant as having been in the restaurant. Also, in this case there are four corroborating points of evidence which in our opinion demonstrate defendant's guilt.

First, while the victim could not identify the defendant at the hearing as his attacker, he did identify the blood stained sweater exhibited by the State as looking "like the sweater that this person had on". This is the sweater which, according to the sworn testimony of the police officer, was found in the defendant's apartment within a few days after the incident in question. Second, the defendant fled to Alabama and it may logically be



assumed that this was not a coincidence but that his flight to Alabama at that time had some connection with the stabbing and robbery of Ray Timmons. Illinois cases have held consistently that defendant's flight after a crime is a circumstance that may be considered with other evidence as tending to prove guilt. (People v. Rossini (1962), 25 Ill. 2d 617, 185 N.E. 2d 831; People v. Lobb (1959), 17 Ill. 2d 287, 161 N.E. 2d 325 .) Third, the defendant, according to police testimony, indicated some prior knowledge of the crime in his query to the police officers who arrested him as to whether the incident involved any colored witnesses and his statement that he wanted to know this because he had seen Mr. Hawks that night. ("Mr. Hawks" is mentioned elsewhere in the record as "Archie Hawks"--apparently a person known both to the police and the defendant.) The mention of Hawks would seem to indicate that Hawks had some knowledge of the incident, which fact would not have been known to the defendant unless he himself had some knowledge of it. The defendant also stated, when the circumstances of the crime were related to him by the police, that he believed the charge should have been assault and battery instead of robbery. While defendant claims this was a mere comment based on the description of the incident given to him by the detectives, the State argues that the remark could only be an indication of guilty knowledge.

Finally, as a fourth corroborating element, there is the general pattern of the crime. In the theft which resulted in the defendant being convicted and placed on probation, the defendant also introduced himself to a stranger, a man who had been drinking over a period of time, accompanied this person when he left the place where they had met, and eventually robbed



and beat him, and then fled to Alabama. When considered with the other circumstances this appears to be more than mere coincidence and lends weight to the identification of the defendant by the waitress and cashier. The additional facts alluded to above pointing to the defendant's guilt furnishes sufficient corroboration of the identification to create the preponderance of the evidence necessary here. We hold, therefore, that under all the circumstances present in this case, the defendant was not denied due process because of the identification procedure.

The defendant contends, however, that even if the identification testimony is allowable, he was denied due process of law by being denied a jury trial and the same standard of proof as is required in any criminal case, that is, proof of guilt beyond a reasonable doubt.

The defendant is clearly not entitled to a jury trial under the statute whereby probation is authorized. Probation is a creature of statute and under Sec. 117-3 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, sec. 117-3) only a "hearing" is authorized before the court, not a jury trial. The cases so holding in Illinois are numerous, among them being People v. Tempel (1971), 131 Ill. App. 2d 955, 268 N.E. 2d 875; People v. Hardnett (1971), 132 Ill. App. 2d 843, 270 N.E. 2d 864; People v. Brooks (1966), 67 Ill. App. 2d 479, 214 N.E. 2d 498; People v. Morgan (1965), 55 Ill. App. 2d 157, 204 N.E. 2d 314; People v. Price (1960), 24 Ill. App. 2d 364, 164 N.E. 2d 528.

On the question of proof beyond reasonable doubt as the standard of proof required for revocation of probation and its accompanying idea of a jury trial, the courts of Illinois have rejected the idea repeatedly. People v. Crowell (1973), 53 Ill. 2d 447, 292 N.E. 2d 721; People v. Shadowens (1973), 10 Ill. App. 3d 450, 294 N.E. 2d 107; People v. Howell (1973), 9 Ill. App. 3d 779, 293 N.E. 2d 18; People v. Witherspoon (1972), 9 Ill. App. 3d 317, 292





N. E. 2d 202; People v. Henderson (1971), 2 Ill. App. 3d 401, 276 N. E. 2d 372; People v. Latham (1971), 132 Ill. App. 2d 823, 270 N. E. 2d 563; People v. Hardnett, supra, and People v. Price, supra.

This is not a narrow view proceeding from the idea that a person on probation has less right to due process than one not so situated and can be treated with less concern. Rather, the rejection of this idea by the legislature as well as by the courts is, we believe, bottomed on the fairly obvious proposition that it would greatly narrow the trial judge's discretion in granting probation and considerably reduce the number of probations granted. The responsibility is great as it is for a judge in granting probation. If probation could only be revoked if the violator was proved guilty beyond a reasonable doubt to the satisfaction of a jury, the courts would hesitate to give probation to many who are now given that chance. Considering that the vast majority of persons granted probation are first offenders and that probation has been on the whole considered a salutary aid in problems of law enforcement, it would not seem to be a net gain socially, but rather a loss, if the chances of probation were to be reduced for the majority in order to give the probation violator a full fledged jury trial with "proof beyond a reasonable doubt" as a measure of proof. Viewed even from the social standpoint we see this idea as being very dubious, but in any event, it is clearly not within our province to adopt such a standard. Both the statute and the decided cases make it very clear that the law of this state does not contemplate proof beyond a reasonable doubt and/or a jury trial for revocation of probation.

The defendant finally argues that even if the photographic identification is allowed to stand and even if the present standard of proof by the preponderance of the evidence is accepted as the present law, the State





did not prove its case by a preponderance of the evidence. We think otherwise. The circumstances related above; the identification of the article of clothing worn by the defendant which the victim remembered; the flight to Alabama after the incident occurred; the remarks made by defendant upon his arrest, plus the identification by the waitress and cashier, all add up certainly to a preponderance of the evidence. More is not required.

The judgment of the circuit court of Winnebago County is affirmed.

Judgment affirmed.

THOMAS J. MORAN, P.J. and GUILD, J., concur.



No. 72-351

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

---

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Plaintiff-Appellee, ) Appeal from the Circuit Court of the First  
 ) Judicial Circuit, Saline County.  
 )  
 vs. )  
 )  
 JOHN H. GREER, JR., ) Honorable Jack C. Morris,  
 ) Judge Presiding.  
 Defendant-Appellant. )

---

PER CURIAM:

Defendant pled guilty to two complaints charging him with the crimes of deceptive practices and to two charges of driving while intoxicated. After his pleas of guilty were accepted by the trial court he was sentenced to two years probation with the first year to be spent at the State Farm in Vandalia.

Defendant contends in this appeal that all of the complaints were void.

With reference to the deceptive practice complaints, although numbered differently, and sworn to two different judges, both complaints read:

"That on Aug. 7, 1972 in Saline County, John H. Greer, Jr. committed the offense of Deceptive Practice in that said defendant with intent to defraud and intent to obtain control over certain property of Boren's IGA Foodliner, a place of business in Harrisburg, Illinois, being United States Currency, did knowingly issue and deliver a bank check to Louis Fulkerson, an employee of said business, dated Aug. 7, 1972, drawn on the Saline County State Bank, payable to Boren's IGA Foodliner, in the sum of \$40.00 and signed as maker, John H. Greer, Jr., knowing said check would not be paid by the depository in violation of Paragraph 17-1(d), Chapter 38, Ill. Rev. Stat."

The complaints follow the language of the statute:

"A person commits a deceptive practice when, with intent to defraud: \* \* \* (d) With intent to obtain control over property \* \* \* of another he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository." (Ill. Rev. Stat., 1971, ch. 38, par. 17-1(d).)

However, there is a glaring defect in the complaints that goes to the issue of whether the complaints charge an offense.

The essence of Section 17-1(d) of the Criminal Code (Ill. Rev. Stat., 1971, ch. 38, par. 17-1(d)) is the intent to defraud and obtain control of property of another.



Section 2-3 of the Criminal Code (Ill. Rev. Stat., 1971, ch. 38, par. 2-3) defines "another" as "a person or persons as defined in this Code other than the offender." Section 2-15 of the Criminal Code (Ill. Rev. Stat., 1971, ch. 38, par. 2-15) defines "person" as "an individual, public or private corporation, government, partnership, or unincorporated association." The two complaints identify "Boren's IGA Foodliner, a place of business" as the "person" defrauded. "Boren's IGA Foodliner, a place of business" is no more a "person" than "Arthur's Grocery Store" (People v. Allsop, 6 Ill.App.3d 688), "Clark Oil Refining Building" (People v. Wicher, 12 Ill.App.2d 57) or "Sully House Fine Furniture Store" (People v. Tenen, 132 Ill.App.2d 786.). Therefore, the complaints are fatally defective in that "Boren's IGA Foodliner, a place of business" is not an entity capable of being defrauded. (People v. Tenen, 132 Ill.App.2d 786.). Such error is not waived by a plea of guilty because the complaints did not charge an offense and thus did not confer jurisdiction on the court.

With reference to the traffic offenses, on August 14, 1972, the defendant was issued a traffic ticket which alleged his offense to be "D.W.I." and failed to cite the section of the Illinois Vehicle Code violated. Although Section 111-3 of the Code of Criminal Procedure (Ill. Rev. Stat., 1967, par. 111-3) establishes that a citation issued on a Uniform Traffic Ticket and filed with the circuit court constitutes a complaint, such complaint must nevertheless charge an offense as outlined in Section 11-3(a). Clearly, the letters "D.W.I." do not charge violation of Section 11-501 of The Vehicle Code (Ill. Rev. Stat., 1971, ch. 95-1/2, par. 11-501). Abbreviations in criminal charges are not favored and "D.W.I." neither describes the offense nor states its elements. (People v. Kountkofsky, 8 Ill.App.3d 725.) This court cannot properly take judicial notice that "D.W.I." stands for driving while intoxicated or suggest the error could have been cured by a bill of particulars. The charge in this case is as void as the charge of "OMVI" in People v. Allen, 8 Ill.App.3d 176. Therefore the conviction on this ticket must also be reversed. A void charge confers no jurisdiction on the court and thus such error is not waived by a guilty plea.

The other ticket was more explicit in that it spelled out that defendant was "driving while intoxicated" in violation of Section 11-501 of the Vehicle Code.





Recently, this court in People v. Smith, 15 Ill.App.3d 107, held a complaint charging the defendant with "driving when under the influence of alcohol or drugs" was void for lack of specificity. Arguably, a complaint alleging only intoxication and no indication of what substance is even less specific than the "alcohol or drugs" phrase in People v. Smith. Therefore, there is also a serious question about the validity of this complaint. However, since no brief has been filed by the State and since there is a serious question about the validity of this complaint, we do not feel that we should adopt the role of an advocate and assert the State's position in this case.

For the foregoing reasons the judgment of the circuit court of Saline County is reversed.

Justice Eberspacher not participating.

Judgment reversed.

PUBLISH ABSTRACT ONLY.



No. 73-27

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS, )	)	Appeal from the Circuit Court of the
Plaintiff-Appellee, )	)	Twentieth Judicial Circuit,
vs. )	)	St. Clair County.
JOHNNY WILSON, )	)	
Defendant-Appellant. )	)	Honorable James W. Gray,
	)	Judge Presiding.

---

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

Defendant-appellant appeals from a judgment of the circuit court of St. Clair County finding him guilty of the offense of burglary and sentencing him to the Illinois State Penitentiary for a minimum of three years and a maximum of ten years.

Defendant was found guilty of the crime of burglary by a jury in St. Clair County.

The evidence disclosed that he was arrested while sitting behind the steering wheel in the front seat of a car parked in front of a B. F. Goodrich Store. The trunk of the car was open and two tires apparently taken from the Goodrich Store were inside the trunk. The police saw another suspect bringing two more tires through the broken window of the store. Upon sighting the police, the suspect dropped the tires and fled.

Defendant claimed that he was just attempting to start the suspect's car and did not know the suspect was burglarizing the B. F. Goodrich building.

Defendant contends (1) that the evidence is not sufficient to prove him guilty beyond a reasonable doubt, (2) that the state committed reversible error by making improper arguments and by improper cross examination, and (3) that he did not waive a hearing in aggravation and mitigation.

We find that no error of law appears, that an opinion in this case would have no precedential value and that the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt.

We therefore affirm in accordance with Supreme Court Rule 23 (Ill. Rev. Stat., ch. 110A, par. 23).

Judgment affirmed.

CONCUR: Eberspacher and Crebs.

PUBLISH ABSTRACT ONLY.



No. 73-59

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court of the
Plaintiff-Appellee,	)	Fourth Judicial Circuit, Shelby County.
vs.	)	
	)	
DELMAR WISEMAN and DAVID GOTTMAN,	)	Honorable Robert J. Sanders,
	)	Judge Presiding.
Defendants-Appellants.	)	

---

PER CURIAM:

Defendant Delmar Wiseman was charged by Information with two counts of burglary and one count of theft. Defendant David Gottman was charged by Information with one count of burglary and one count of conspiracy to commit burglary.

On October 6, 1972 Wiseman pleaded guilty to both counts of burglary and Gottman pleaded guilty to one count of burglary and one count of conspiracy. Each defendant was sentenced, pursuant to a plea agreement, to serve two concurrent terms of two to six years in prison. Both appeals have been consolidated in this case. The state has not filed a brief.

Defendants contend (1) that the trial court failed to advise the defendants of the nature of the charge prior to accepting their waiver of indictment as required by Supreme Court Rule 401(b)(1); (2) that the trial court failed to admonish the defendants that felony prosecution is by indictment only unless waived as required by Supreme Court Rule 401(b)(3); (3) that the trial court, prior to accepting defendants' plea of guilty, failed to inform them of and determine that they understood the provisions of Supreme Court Rule 402(a)(1), 402(a)(3), 402(a)(4), and 402(b).

The record reflects that all of the foregoing contentions have merit. For the foregoing reasons the judgment of the trial court is reversed and this case is remanded to the circuit court of Shelby County with directions to allow the defendants to plead anew.

Justice Eberspacher not participating.

Reversed and remanded  
with directions.

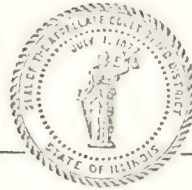
PUBLISH ABSTRACT ONLY.



72-221

People vs. Henry A. Craven

STATE OF ILLINOIS



APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-four, within and for the Third District  
of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
April 18, 1974 the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:





In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	Will County
	)	
HENRY A. CRAVEN,	)	
	)	
Defendant-Appellant.	)	

---

PER CURIAM

Abstract

---

This is an appeal from a judgment of the Circuit Court of Will County, finding defendant guilty of two separate offenses of theft in excess of \$150. Defendant pleaded guilty and waived indictment. He was sentenced to a term, following his negotiated plea, of not less than three nor more than eight years for each offense, with the sentences to be concurrent with a prior sentence imposed for forgery. The office of the State Appellate Defender was appointed to represent defendant in this appeal. Such Defender has now moved for leave to withdraw as counsel on appeal for appellant in accordance with the precedent in Anders v. California, 386 U.S. 738, and states that an examination of the record by counsel (accompanied by a brief in support of counsel's conclusion) has forced the conclusion that an appeal would be completely frivolous and could not possibly succeed. As we have indicated, the terms of the negotiations resulted in the sentence of three to eight years for each offense of theft, with the sentences to be served concurrently, and, also, concurrently with the previous sentence for forgery for which defendant was on parole at the time the thefts were committed. It is shown that defendant has already been before the parole and pardon board and is



again scheduled to reappear before such board in May of 1974.

The causes were consolidated for the purpose of the plea proceeding. All provisions of Supreme Court Rule 401 (Ill. Rev. Stat. 1973, ch. 110A §401) were complied with during the course of the procedure incident to waiver of indictment. The defendant was represented by counsel and the essential allegations of both informations were read to defendant. The court explained the minimum and maximum penalties which could be imposed upon defendant. In response to the court's inquiries, the defendant affirmed his understanding of the nature of the charge and the minimum and maximum penalties. The trial court clearly explained to defendant that he had an absolute right to indictment by the Grand Jury and that he could be prosecuted under an information only if he waived indictment. The informations were also phrased in simple language and contained all the essential elements of the thefts and adequately advised Craven of the charges against him.

In accepting the plea, the trial court fully complied with the requirements of Supreme Court Rule 402 (Ill. Rev. Stat. 1973, ch. 110A §402). The informations were read and defendant again affirmed his understanding of the nature of the charges and of the minimum and maximum penalties. The trial court explained to defendant that he was waiving his rights to a jury trial and to confront witnesses against him. Defendant Craven acknowledged his understanding that he was waiving his rights, and defendant also confirmed that no force, threats or promises apart from the plea agreement were used to obtain the plea of guilty.

The plea agreement was stated in open court and the trial court acknowledged the court's concurrence in such agreement. Defendant confirmed that the plea agreement was accurately stated and also confirmed that he was getting what he bargained for. The factual basis was recited for the record and



defendant Craven expressed his satisfaction with the services of his private counsel.

As we have indicated, defendant was sentenced to a negotiated term of three to eight years for each offense and the sentences were specified to be served concurrently with each other and concurrently with the previous sentence for forgery for which defendant was on parole at the time the thefts were committed.

On the basis of the record, we concur in counsel's contention that there is no basis for maintaining an appeal in this cause and that the continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Will County is, accordingly, affirmed, and for the reasons stated, the motion of the State Appellate Defender to withdraw as counsel for defendant Henry A. Craven is allowed.

Judgment Affirmed and  
Withdrawal Motion Allowed.





ARLENE BLITENTHAL, ) APPEAL FROM  
Plaintiff-Appellant, )  
 ) CIRCUIT COURT,  
vs. )  
 ) COOK COUNTY.  
FAYE DRESSLER, )  
Defendant-Appellee. ) HON. BENJAMIN NELSON,  
Presiding.



MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

This case arose as a personal injury action in which the plaintiff sought recovery of damages on two counts, the first due to the defendant's negligence and the second due to her wilful and wanton conduct. The court directed a verdict for the defendant on the second count at the close of all the evidence. The jury rendered a verdict for the defendant on the first count. The plaintiff appeals.

On May 1, 1965, the plaintiff was driving northbound on Karlov Avenue in Skokie, Illinois, when her car collided with that of the defendant, who was proceeding westbound on Grove Street. The incident occurred in the intersection of the two roadways at about 4:00 P.M. The weather was good, the roads were dry and visibility was excellent.

There is a "Yield-the-Right-of-Way" sign for traffic proceeding westbound on Grove. There is no sign or stoplight control for traffic on Karlov at the intersection with Grove. Both streets have two lanes for moving traffic and two curb lanes for parked cars. Both are two-way streets.

The automobiles were both in good mechanical order before the occurrence. The plaintiff's car was damaged in the collision on the right side. Damage to the defendant's car was in the grille and fender. Both parties were familiar with the area and knew of the existence of the "Yield" sign. The area is



residential, with homes on all four corners of the intersection of Grove and Karlov.

The plaintiff testified that when she was one-quarter of a block south of the intersection her speed was about 15 to 20 miles per hour. There was a house on her right, and to the north of the house there was shrubbery which extended north-bound to a distance of approximately two car-lengths from the south curb of Grove. She stated that after she passed the house and shrubbery, and when she was approximately two car-lengths from the intersection, she first glimpsed, out of the corner of her eye, the defendant's car, which was then four or five car-lengths east of the east curb of Karlov, traveling at about 30 to 40 miles per hour. The plaintiff said that at that point she was still going about 15 to 20 miles per hour. She slowed down as she entered the intersection, at which time the defendant's car was one to one and a half car-lengths from the intersection. She testified that the defendant's car did not slow or change direction before the impact. The plaintiff did not alter her direction. She stated that she continued to watch the defendant's car up to the point of impact. The collision rendered her unconscious, and she awoke in her car on the lawn at the northwest corner of the intersection.

The defendant testified under Section 60 (Ill.Rev.Stat., 1969, ch. 110, par. 60) that her vehicle was moving at about 15 to 20 miles per hour at the time of the collision, and that it was proceeding west in the westbound lane of Grove. She said that she applied her brakes when she reached the "Yield" sign at Karlov. She testified that when she was one-quarter of a block from the intersection, she slowed to five miles per



hour, which was her speed when she was 50 feet from the intersection. She stated that she first observed the plaintiff's car no more than three seconds prior to impact and that it was going about 35 to 40 miles per hour. She stated that when observed the plaintiff's car was already in the intersection and that the defendant slammed on her brakes but could not avoid hitting it. She said that she did not sound her horn or swerve to avoid the plaintiff's car. When the defendant first saw plaintiff's car, it was right in front of her. The defendant was at that time starting up from the "Yield" sign. At the moment of impact the plaintiff's car was also in the westbound lane of Grove. The defendant testified that the plaintiff's car came to rest on the lawn on the northwest corner of the intersection, while her own car stopped in the intersection. She denied ever saying that she was going 15 to 20 miles per hour at the time of the collision or saying that she did not see the plaintiff's car until impact.

Thomas Lund, a former police officer for the Village of Skokie, arrived at the scene of the occurrence and observed debris 20 feet east of the west curb of Karlov and 14 feet north of the south curb of Grove. He observed that the plaintiff appeared to be in shock, and he was unable to take a statement from her. He did take a statement from the defendant as to her version of the incident and as to comments made by the plaintiff to her. He testified that the defendant told him she did not see the plaintiff's vehicle until impact, and that as she passed the "Yield" sign her car was going 15 to 20 miles per hour. He also stated that the defendant had told him that the plaintiff had said to her that the plaintiff was going about 20 miles per hour and did not see the defendant until her car was





struck. The officer testified that his testimony was based on a report he made and that he included statements made by the plaintiff as related by the defendant because the plaintiff was in shock and this was the department's procedure in such cases.

The plaintiff's principal argument is that the trial court erred in directing a verdict for the defendant on count two of her complaint, alleging wilful and wanton conduct by the defendant. Applying the standard for reviewing a directed verdict, we must decide if all of the evidence viewed in its aspects most favorable to the plaintiff so overwhelmingly favors the defendant that no contrary verdict could ever stand. (Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 229 N.E.2d 504.) The evidence necessary to support a verdict of wilful and wanton conduct must be such as shows the injury was intentional or the act was committed under circumstances exhibiting a reckless disregard for the safety of others. (Schneiderman v. Interstate Tr. Lines, 394 Ill. 569, 69 N.E.2d 293.) On the record before us, we conclude that the trial court properly withdrew from the jury the question of wilful and wanton conduct. The plaintiff failed to show that the defendant was conscious of her conduct and conscious from the surrounding circumstances that the conduct would naturally and probably cause injury to another. (Glaze v. Owens, 104 Ill. App.2d 172, 243 N.E.2d 13.) Moreover, if we accept the plaintiff's version of the occurrence, that she observed the defendant's approach at 35 to 40 miles per hour and made no attempt to avoid the collision or warn the defendant of her presence, we find the plaintiff is barred from recovery by her own wilful and wanton conduct. (Zank v. C.R.I. & P.R.R. Co., 17 Ill. 2d 473, 161 N.E.2d 848.





The plaintiff's next contention is that the court should have directed a verdict for the plaintiff on count one of her complaint, or at least have ordered a new trial on the issue of negligence. Again applying the Pedrick standard, we find that the issue of the defendant's negligence was properly submitted to the jury. The evidence, viewed in its aspects most favorable to the defendant, does not so overwhelmingly favor the plaintiff that no contrary verdict could ever stand.

In reaching our decision as to whether a new trial is warranted, we look to see if a substantial amount of evidence supports the verdict. (Bunton v. Illinois Cent. R. Co., 15 Ill. App. 2d 311, 146 N.E.2d 205.) There was conflicting testimony as to the conduct of both the plaintiff and the defendant. The jury had the opportunity to observe the witnesses and determine their credibility. We will not disturb the jury's finding unless it is clearly erroneous. We find that the verdict was not contrary to the manifest weight of the evidence.

The plaintiff's final argument is that remarks by defendant's counsel, to the effect that the defendant was uninsured, were prejudicial and require reversal. The challenged statements, which follow, were contained in counsel's closing argument:

"You [the jury] look at a witness. You observe his demeanor or you listen to things he says and you compare the things he said with the things you know to be true and not true and if the testimony of any witness falls short of what you and your good judgment determines is good credibility, then you can disregard the testimony of that witness. And you don't have to consider that testimony in rendering your judgment in this case, because you and you alone render the judgment in this case. You and you alone act as the conscience of the community in this case, standing between that \$73,000 and my client, Mrs. Dressler. No one else. We rely on the judgment of you 12 people and you are the only ones that stand between the plaintiff and my client and the request for \$73,000."



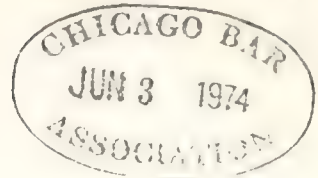
We agree with the defendant that the italicized remarks in their quoted context do not suggest the absence of insurance. (See Piechalak v. Liberty Trucking Co., 58 Ill.App.2d 289, 208 N.E.2d 379.) Even assuming such an interpretation could be drawn from the statement, the plaintiff failed to preserve her argument on this point by raising an objection at trial. (McElroy v. Force, 38 Ill. 2d 528, 232 N.E.2d 708; Bruske v. Arnold, 44 Ill. 2d 132, 254 N.E.2d 453.) Failure to object will not constitute a waiver if review is necessary to insure a fair trial and prevent deterioration of the judicial process. (Ferrer v. Vecchione, 98 Ill.App.2d 467, 240 N.E.2d 439.) We find no justification for application of that rule in this case.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

EGAN and HALLETT, JJ., concur.





59251

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
DANIEL WILHITE (Impleaded),	)	HON. JAMES M. BAILEY,
	)	Presiding.
Defendant-Appellant.	)	

\*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Daniel Wilhite (defendant) was originally charged by indictment with burglary (Ill. Rev. Stat. 1971, ch. 38, par. 19-1.) On October 8, 1971, defendant entered a plea of guilty and was placed on probation for a period of five years with the condition that the first three months be spent in Cook County Jail.

On February 16, 1973, a hearing was held on a rule to show cause why defendant's probation should not be terminated based upon the fact that he had been subsequently convicted of delivery of a controlled substance. At the hearing on the rule to show cause, defense counsel, in defendant's presence, stipulated that defendant had in fact been subsequently convicted of delivery of a controlled substance and sentenced to a term of one to five years. At the conclusion of the hearing the trial court revoked defendant's probation and, after a hearing in aggravation and mitigation, sentenced him to a term of six to 18 years, to be served concurrently with the previously imposed sentence for delivery of a controlled substance.

Defendant's first argument on appeal is that the trial court's acceptance of his admission through counsel of the violation of probation without prior admonishment under Supreme Court Rule 402 constitutes a violation of due process. In People v. Beard, 15 Ill. App. 3d 663, 304 N.E.2d 707, this court rejected

\*Mr. Justice Burke did not participate.





this contention, holding that Supreme Court Rule 402 is not applicable to probation revocation hearings. See also People v. Collins, 14 Ill. App. 3d 446, 302 N.E.2d 709.

The record filed in this court reveals that at the hearing on the rule to show cause why defendant's probation should not be terminated, defendant was given notice and a copy of the charge, had an opportunity to be heard, was represented by counsel, had a conscientious determination of his cause and was given a written report of the proceedings. (Gagnon v. Scarpelli, 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 and People v. Morales, 2 Ill. App. 3d 358, 276 N.E.2d 391.) The proceedings at the hearing on the rule to show cause why defendant's probation should not be terminated did not in any manner deprive defendant of due process of law. The trial judge was not required to admonish defendant pursuant to Supreme Court Rule 402.

In a supplemental brief, defendant has argued that his sentence is excessive and should be reduced. While this court has the authority to reduce a sentence, our Supreme Court has indicated that this authority should be exercised with considerable caution and circumspection. (See People v. Fox, 48 Ill. 2d 239, 251, 252, 269 N.E.2d 720 and People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673.) The imposition of sentences is within the discretion of the trial court, and courts of review will not interfere with that discretion unless the sentence is clearly excessive. (People v. Keene, 1 Ill. App. 3d 720, 274 N.E.2d 130.) Here, considering the nature of the offense, the facts of the case and defendant's prior record, we are of the opinion that the sentence imposed upon the defendant is not excessive. However, defendant is entitled to credit upon his sentence for time spent on probation. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(h).) See



People v. Johnson, 13 Ill. App. 3d 1020, 1026, 304 N.E.2d 681  
and People v. Murray, 13 Ill. App. 3d 987, 301 N.E.2d 612.

The judgment of the circuit court of Cook County is affirmed and the cause is remanded with directions to issue an amended mittimus which reflects the time served on probation.

Judgment affirmed, cause remanded.



NO. 57997

FORTY-SEVENTH & CICERO .	)	APPEAL FROM
CURRENCY EXCHANGE, INC.,	)	CIRCUIT COURT
	)	COOK COUNTY
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	HONORABLE
C. AUSTIN MONTGOMERY, Director	)	EDWARD J. EGAN,
of Financial Institutions,	)	PRESIDING.
and THILLENS, INC.,	)	
	)	
Defendants-Appellants.	)	

ON GRANT OF REHEARING

PER CURIAM:

Forty-Seventh & Cicero Currency Exchange, Inc. (plaintiff) filed a complaint for administrative review of a decision by C. Austin Montgomery, Director of the Department of Financial Institutions (Director) awarding Thillens, Inc. (defendant) an ambulatory currency exchange license to perform on-location check cashing services for the employees of an industrial plant located a short distance from plaintiff's long established community currency exchange. See Ill. Rev. Stat. 1971, ch. 110, par. 264 et seq. The circuit court heard arguments of counsel, considered the report of proceedings from which the Director reached his conclusions, found that the Director's decision was against the manifest weight of the evidence and contrary to law, and reversed.

Defendants appealed, contending that the circuit court erred in finding that the decision of the Director was against the manifest weight of the evidence. We affirmed the judgment of the circuit court on the ground that the record filed in this court failed to incorporate the report of proceedings taken at the hearing before the administrative hearing officer. It was thereafter brought to our attention through defendant's Petition for Rehearing that, through a clerical oversight,



the record made before the administrative agency had not been included in the record on the instant appeal, although its inclusion had been allowed by this court upon motion of the defendant; we granted the Petition for Rehearing.

The record discloses that upon preliminary investigation by the Director, the defendant's application for the license in question was denied. A full hearing was thereafter allowed before an administrative hearing officer, at which the evidence disclosed that the management of the Perk Foods Company, 4400-4540 South Kolmar Avenue, Chicago, had been experiencing security and tardiness problems with regard to certain employees cashing their paychecks on Fridays. The Perk Foods plant was situated about one-half mile from plaintiff's premises, and the sole access to the Perk Foods plant was from 47th Street to the south, there being no east or west arteries directly to or from the plant; traffic along 47th Street was also congested. Evidence was adduced that about half of the Perk hourly employees, numbering a total of about 200, cashed their payroll checks at plaintiff's establishment; that the Perk employees' business constituted about 10 or 11 per cent of plaintiff's business; and that other employers in the area paid their employees by check, some of which were also cashed at plaintiff's exchange. It also appears that the Perk Foods management permitted certain employees to leave the plant premises and return late, for the purpose of cashing their payroll checks, solely as an accommodation on the part of the Company; that such practice had caused friction among the employees, and that the Perk Foods management promised to solve their employees' check cashing problems; application was made by defendant to provide a check cashing service at the Perk Foods plant, and the Perk employees were interested in the outcome of





defendant's application. In addition to the testimony offered by management of Perk Foods and by management of plaintiff, introduced into evidence at the administrative hearing were a map of the plaintiff's and of Perk Foods' locations, and several letters and affidavits.

The report of the administrative hearing officer consisted of the following findings:

"I. That the issuance of the proposed ambulatory license would promote the convenience and advantage of the community. He specifically finds that the evidence establishes:

- "A. The service is desired by the applicant and its employees, and
- "B. The issuance of such a license would not threaten the financial stability of existing community currency exchanges, and
- "C. The issuance of such a license would, in a small measure, reduce the Friday afternoon traffic congestion on 47th Street in such community.

"II. The issuance of an ambulatory license would not threaten the financial stability of the 47th and Cicero Currency Exchange, Inc. He specifically finds that the evidence establishes:

- "A. That the 47th and Cicero Currency Exchange, Inc. has a gross annual revenue of about \$60,000.00, and
- "B. Such currency exchange cashes between 70 and 95 checks weekly of applicant's employees, and
- "C. Such loss of business would result in a loss of revenue, but there is no evidence that the financial stability of such community currency exchange is threatened.

"THEREFORE, since the issuance of a license at the proposed location would promote the convenience and advantage of the community, and would not threaten the financial stability of the 47th and Cicero Currency Exchange, Inc., the Hearing Officer concludes that the applicant has met the statutory requirements for the issuance of the proposed location license, and recommends therefore that the Director reverse and set aside his ORDER OF DENIAL of application herein, dated May 10, 1971, and that he instead cause the issuance of the license herein sought."



The findings and report of the hearing officer were thereafter adopted by the Director, and the application for an ambulatory license to service the Perk Foods plant was approved by him. Plaintiff then filed the instant action for administrative review.

The test established by the Illinois Community Currency Exchange Act for the grant or denial of a license to engage in the currency exchange business is the convenience and advantage of the community to be serviced by the proposed exchange. Ill. Rev. Stat. 1971, ch. 16 1/2, par. 34.1, 34.3; Thillens, Inc. v. Department of Financial Institutions, 24 Ill. 2d 110, 180 N.E. 2d 494. The term "community" is defined by the Act as a locality where there may or can be available to the people thereof the services of a community currency exchange reasonably accessible to them; that term is not synonymous with the term "location" as used in connection with an ambulatory currency exchange. Ill. Rev. Stat. 1971, ch. 16 1/2, par. 34.1, 34.3; Thillens, Inc. v. Department of Financial Institutions, supra. The Supreme Court in the Thillens case further held that the test as to whether a license should be issued is not whether the financial stability of existing exchanges in the area will be impaired.

The criteria employed by the Director of Financial Institutions in allowing the defendant's application for license in the instant case were contrary to that established by the foregoing sections of the Act and by the Supreme Court decision in the Thillens case. As demonstrated by the findings of the hearing officer, which were adopted by the Director, the evidence in the case showed only minimal and limited benefit to the "community" upon issuance of the license to defendant, that of reduced traffic congestion "in some small measure" along 47th Street on Friday afternoons.



The balance of the findings in the report, as the evidence adduced below further demonstrates, relates to the benefit afforded the Perk Foods "location" and to the lack of financial impairment of plaintiff's existing currency exchange business, both criteria which were not accepted by the Supreme Court in Thillens, supra.

The case of Eddin v. C. Austin Montgomery, Director, 15 Ill. App. 3d 909, 305 N.E. 2d 316, has upheld the trial court's reversal of the Director's issuance of an ambulatory license upon almost identical grounds and upon an almost identical factual situation as presented in the instant case. In the recent case of Division-Kostner Currency Exchange, Inc., et al., v. C. Austin Montgomery, Director, \_\_\_ Ill. App. 3d \_\_\_, \_\_\_ N.E. 2d \_\_\_ (#59243, 1st Dist., March 4, 1974), this court reversed the trial court's affirmance of the Director's issuance of an ambulatory license, where the record failed to disclose that the license would "promote the convenience and advantage of the community," whereas the record did disclose that the primary benefit of the license would be to the particular location served.

Under the standards established by the Community Currency Exchange Act (Ill. Rev. Stat. 1971, ch. 16 1/2, par. 30 et seq.) as construed in Thillens, Inc. v. Department of Financial Institutions (1962), 24 Ill. 2d 110, 180 N.E. 2d 494, we recognize that, where the majority of the employees of an employer at any given location in a community are not themselves members of that local community, it will be difficult for an applicant for a license for an ambulatory currency exchange to meet the said standards, no matter how strong a showing the applicant makes of convenience and benefit to both employees and employer at the given location. But we cannot say that the said standards as so construed are





unreasonably difficult, nor are we free to ease the said standards.

The decision of the Director of Financial Institutions granting the ambulatory license to defendant under the circumstances of this case was clearly erroneous; the trial court properly held that decision to have been contrary to law and against the manifest weight of the evidence presented below. We adhere to our original decision in this matter and affirm the judgment of the circuit court of Cook County reversing the decision of the Director of Financial Institutions.

Judgment affirmed.

Second Division; Downing, J. did not participate.

Publish abstract only.

3-10-11  
2nd  
3rd



No. 57561

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	
	)	COURT OF COOK COUNTY.
vs.	)	
	)	HONORABLE
JOHN ROBERT TORNABENE,	)	EARL E. STRAYHORN,
	)	PRESIDING.
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

After a bench trial in the circuit court of Cook County, defendant was found guilty of the unlawful sale of a narcotic drug, heroin, and was sentenced to a term of five to ten years. Ronald Ramirez and his sister Theresa Ramirez pleaded guilty to the same offense, and they are not involved in this appeal. (See People v. Theresa Ramirez (1974), --Ill.App.3d--, Nos. 57562, 57563.) On appeal defendant contends that he was not proved guilty beyond a reasonable doubt, and that the trial court erred in permitting certain incompetent and prejudicial testimony into evidence.

Illinois Bureau of Investigation agents Joseph Grady and Robert Fanter were the sole witnesses for the State. At approximately 2:30 p.m. on February 3, 1971, the two agents met with Ronald Ramirez at a tavern in the City of Chicago for the avowed purpose of buying heroin. After Ramirez left their presence to receive and then make a telephone call, the three men drove in the agents' auto to the vicinity of Wicker Park and Wolcott Street, pursuant to Ramirez' directions. After they had parked, Ramirez asked if the two men had the required one thousand dollars to purchase the narcotics. Fanter showed Ramirez a roll of ten and twenty dollar bills amounting to \$1,000. The agents had prerecorded the money. Fanter and Ramirez then left the car and walked into a nearby department store. Once inside the store, Fanter gave the money to Ramirez.

Shortly thereafter the defendant entered the store and began walking toward the two men. Fanter testified on direct examination, over defendant's objection, that Ramirez had noted,



"This is my connection," as defendant approached. On cross-examination Fanter testified that Ramirez stated, "You'll be meeting my connection," and that the words had been uttered before defendant had ever entered the store. Fanter further testified that defendant had a brief conversation with Ramirez out of his hearing, which concluded with Ramirez handing defendant approximately \$950 of the prerecorded money. Defendant accepted the money, put it into his pocket, and left the store.

Fanter and Ramirez exited the store approximately five minutes later. After Fanter expressed concern about the money, Ramirez entered a restaurant and made a telephone call, again outside the agent's presence. He returned to reassure Fanter not to worry because "[s]he will bring the stuff." The two men then walked to a food store located at Milwaukee and Wolcott Streets. Upon entering it, they observed Theresa Ramirez, accompanied by a small child, pushing a grocery cart. The cart contained a blue sock. Theresa pushed the cart toward the men and walked out of the store. Fanter opened the sock and discovered white powder, stipulated at trial to be 29.6 grams of heroin. Grady, who arrived at the store as Theresa was leaving it, testified that as he followed her out he observed defendant in an alley across the street talking to a man. Approximately thirty minutes had elapsed from the time of defendant's exit from the department store to the time of Theresa's delivery at the food store.

Defendant was the sole witness for the defense. He asserted that he was a friend of Ronald and Theresa Ramirez and that he had known them for about one year. On the day in question he went to Theresa's apartment to seek permission to borrow her car. She conditioned her permission upon defendant's driving her and her two year old child to a local department store. Once they arrived at the store, Theresa asked defendant to go inside and tell her brother that she would like to see





him outside. Defendant agreed, and, as he approached Ronald, observed that Ronald was in the company of a stranger. After defendant relayed Theresa's instructions, Ronald pulled out a roll of money and handed it to him with instructions to give it to his sister and inform her that "it's all there." Without noticing the denominations of the money, defendant accepted it and stuffed it into his pants pocket, commingling it with his own twenty dollar bill and three ten dollar bills. When he returned to the car, he removed all the money from his pocket, counted out and returned to his pocket fifty dollars, and handed the rest to Theresa. As Theresa unfolded the roll of bills, defendant for the first time noticed the large amount of money and questioned her as to its purpose. When Theresa replied that her brother was making a narcotics sale, defendant disclaimed any involvement and soon left the car. Defendant further testified that he later returned to her apartment, where he was subsequently arrested. The prosecutor did not cross-examine the defendant.

Defendant initially contends that the evidence did not establish his guilt beyond a reasonable doubt. The State concedes that the conviction must rest upon the persuasiveness and weight of circumstantial evidence. When such evidence is the foundation of the State's proof, the facts must be not only consistent with defendant's guilt but also be inconsistent, upon any reasonable hypothesis, with his innocence. (People v. Turner (1973), 13 Ill.App.3d 1079, 302 N.E.2d 365.) Although it is the duty of the trier of fact to determine the credibility of the witnesses, a court of review will reverse the conviction if the evidence leaves it with a doubt of defendant's guilt. (People v. Dougard (1959), 16 Ill.2d 603, 158 N.E.2d 596.) An essential element to be proved by the State is that the defendant had the necessary intent and capacity to exercise control over the heroin. (People v. Bussie (1968), 41 Ill.2d





323, 243 N.E.2d 196, cert. den. 1969, 396 U.S. 819.

In our judgment, the circumstantial evidence in the present case was sufficient to prove defendant guilty beyond a reasonable doubt. Agent Fanter gave Ronald Ramirez one thousand dollars of prerecorded money in small denominations as payment for heroin. Ramirez gave nine hundred fifty dollars of that money to defendant, who accepted it without question. Thirty minutes later and some distance away, the heroin was delivered by Theresa Ramirez. At the time of the delivery of the heroin in a store, defendant was seen standing nearby. Shortly thereafter, defendant was arrested in Theresa's apartment, and was found to be in possession of some of the prerecorded money.

We recognize that a conviction must be sustained on the strength of the State's case and not on the weakness of the defendant's case. (People v. Coulson (1958), 13 Ill.2d 290, 149 N.E.2d 96.) However, whenever a defendant takes the stand, he submits his testimony to the trier of fact for scrutiny as to its reasonableness. We believe that the testimony of defendant, rather than offering a rational hypothesis of innocence, was implausible and properly rejected by the trial court. Defendant testified that he entered the first store to tell Ronald that Theresa was in the parking lot, and that he then innocently accepted the \$950 in small bills and commingled it with his own money. He further testified that his first realization of having received a large amount of money occurred when Theresa was unfolding the roll of bills. He stated that it was only then that he learned a sale of narcotics was taking place, and that he later departed so as not to be involved in a crime. Yet a short time later he was arrested in Theresa's apartment while possessing some of the prerecorded money.

Defendant argues, however, that the State's failure to call either Ramirez as a witness gives rise to a strong inference that their testimony would be damaging to the State's case. Ronald and Theresa, who had pleaded guilty to their involvement



in the crime, apparently were present in court during defendant's trial but were not called as witnesses.

While circumstances can exist where the failure by the State to call known and available witnesses will lead to a negative inference (People v. Smith (1971), 3 Ill.App.3d 64, 278 N.E.2d 551), the general rule is that the State is not obligated to call all witnesses to a crime, and no inference will arise from the failure to do so. (People v. Jones (1964), 30 Ill.2d 186, 195 N.E.2d 698.) The general rule has even greater application when the prosecution has reason to doubt the integrity of the possible witnesses. (People v. Izzo (1958), 14 Ill.2d 203, 151 N.E.2d 329, app. dism. 1960, 362 U.S. 403.) In the present case, the defendant was a friend of Ronald and Theresa Ramirez, and no inference arose in favor of defendant because of the State's failure to call them as witnesses.

Defendant next contends that the trial court committed reversible error by considering incompetent evidence, arguing that the judge improperly considered hearsay testimony. Agent Fanter on direct examination testified that Ronald Ramirez said to him, as defendant approached them, "This is my connection." On cross-examination, Fanter stated that the words were, "You'll be meeting my connection," and that the statement was made prior to defendant's entry into the department store.

We agree with defendant that the statement, in whatever form, was clearly hearsay, for it was made out of court and introduced to prove the truth of the matter asserted. (People v. Hoffmann (1970), 124 Ill.App.2d 192, 260 N.E.2d 351.) We do not believe, however, that its introduction was so prejudicial as to require reversal. In a trial without a jury there exists a qualified presumption that the judge considered only competent evidence and that all incompetent evidence was disregarded by him in reaching his decision. (People v. Robinson (1964), 30 Ill.2d 437, 197 N.E.2d 45.) Unless it affirmatively appears



that the court was mislead or improperly influenced by the incompetent evidence so that it produced a judgment of conviction contrary to law, the reviewing court will not reverse. (People v. Grodkiewicz (1959), 16 Ill.2d 192, 157 N.E.2d 16.)

In the present case, it is clear that the trial court was not unduly influenced or mislead by the hearsay testimony. Indeed, when the prosecutor was examining Fanter as to Ronald's statement, defense counsel's objection was restricted to finding out to whom Ronald made the statement. The trial judge overruled the objection, but indicated that later he would consider a motion to strike that portion of the testimony. Although defense counsel's subsequent examination of Fanter on the issue clearly revealed that the statement was hearsay, defense counsel, apparently recognizing its minimal effect in this bench trial, never renewed his objection or made a motion to strike the testimony.

We find no merit in defendant's contention that the introduction of certain testimony was improper in that it indicated a criminal propensity on his part and implied that he had committed unrelated crimes. Over objection, Fanter testified as to the events surrounding defendant's arrest. Fanter stated that, at the time he had entered Theresa's apartment, defendant was standing between the bathroom and living room with wet hands and that the toilet was flushing. Fanter recovered a piece of clear plastic containing white powder from the toilet bowl. Fanter stated that a portion of the powder had been tested at the crime lab, but that no report had ever been received from the lab. Since the powder was not shown to be narcotics and since it was not found in defendant's possession, there was no proof of the commission of an unrelated crime by defendant. The introduction of Fanter's testimony concerning the arrest, even if erroneous, could not have been prejudicial to defendant. We find equally without merit defendant's claim that Fanter's use





of the word "connection" implied previous sales of narcotics, and that the phrase constituted reversible error.

Defendant was sentenced to a term of five to ten years. Under the Illinois Unified Code of Correction (Ill.Rev.Stat. 1972 Supp. ch.38,par.1005-8-1(c)(3)), the minimum sentence for a class 2 felony shall not be greater than one-third of the maximum. The offense of sale of narcotic drug (less than 30 grams) is a class 2 felony. (Ill.Rev.Stat. 1972, ch.56-1/2, par.1401(b).) Accordingly, defendant's minimum sentence is reduced to a term of three years and four months. As modified, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed as modified.

DEMPSEY and MEJDA, JJ., concur.





No. 58610

PEOPLE OF THE STATE OF ILLINOIS, )	APPEAL FROM THE
Plaintiff-Appellee, )	CIRCUIT COURT OF
vs. )	COOK COUNTY.
VERSIE GILMORE, )	
Defendant-Appellant. )	HONORABLE
	IRWIN COHEN,
	PRESIDING.

PER CURIAM:

Versie Gilmore, defendant, was found guilty after a bench trial of the offense of theft in violation of section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, par. 16-1(a)(1).) He was sentenced to a term of four months in the House of Correction. Defendant appeals, arguing that the evidence was insufficient to establish beyond a reasonable doubt that he was accountable for the conduct of his companions and that, even assuming that he was accountable, by his conduct he effectively withdrew his agreement to commit a crime and thereby terminated his accountability.

At trial, the following evidence was adduced: Benton Fisher, Jr., age 17, testified that on August 19, 1972, at 1:00 A.M., he was walking home in the vicinity of 3910 W. Arthington, Chicago, Illinois. He was approached by four men walking together, one of whom was the defendant. When the men came up to Fisher, defendant said, "He's all right. Leave him alone." Defendant then walked approximately five feet away and stood there. One of the other men produced a gun and said, "Next time you ain't going to be able to testify." The other men then took Fisher's wallet containing \$20. All four men then left together and walked across the street.

Defendant's first contention on appeal is that the evidence was insufficient to establish beyond a reasonable doubt that he is accountable for the conduct of his companions. Under



section 5-2(c) of the Criminal Code (Ill.Rev.Stat., ch.38, par. 5-2(c)), a person is legally accountable for the conduct of another when:

"Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

The burden is upon the State to prove all of the above elements beyond a reasonable doubt. People v. Mitchell, 12 Ill.App.3d 960, 299 N.E.2d 472.

Here, the undisputed evidence established that the defendant, together with three other men, approached Fisher as he was walking down the street. Defendant then said, "He's all right. Leave him alone." Defendant then walked five feet from Fisher and stood there while one of the other men produced a gun and took Fisher's wallet containing \$20. During the actual robbery, defendant said or did nothing. A defendant's presence at the scene of a crime or negative acquiescence is insufficient to establish his accountability for another's acts. (People v. Barnes, 311 Ill. 559, 143 N.E.2d 445.) There is nothing in the record which would support the conclusion that the four men approached Fisher with the specific intention of robbing him. The second man's comment, "Next time you ain't going to be able to testify.", would indicate that the men may have been out for revenge against someone having testified against one of them in court. Although the defendant may have been out with the group to accost someone who had testified in court, there is no evidence of a common design to commit a theft. The fact that defendant stood there during the theft and then left with the other men is not sufficient, considering all of the evidence, to establish beyond a reasonable doubt



that he was accountable for the actions of the three other men. People v. Bowman, 132 Ill.App.2d 744, 270 N.E.2d 285.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

Third Division. Mr. Justice Mejda did not participate.







No. 59201

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	
	)	COURT OF COOK COUNTY.
vs.	)	
	)	HONORABLE
R. J. JOHNSON,	)	FRANK B. MACHALA,
	)	PRESIDING.
Defendant-Appellant.	)	

PER CURIAM:

R. J. Johnson, defendant, was found guilty after a bench trial of the offense of criminal trespass to a vehicle in violation of section 21-2 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, par.21-2). He was sentenced to a term of 30 days in the House of Correction. Defendant appeals, arguing that he did not knowingly and understandingly waive his right to a jury trial, and that the evidence was insufficient to establish ownership of the vehicle beyond a reasonable doubt.

At trial, the following evidence was adduced: Ray Santiago testified that his family owned a 1965 Ford Mustang. On May 3, 1973, the vehicle was stolen out of a private parking lot. A friend of his saw the vehicle parked on Clybourn Avenue and he went to investigate. At that time, the witness observed the defendant come up to the car, open the front door and step into the rear seat of the car where he picked up some papers. No one in the family had given the defendant authority to enter the vehicle.

Officer Hennelly, a Chicago Police investigator, testified that he was assigned the investigation of the theft of the Santiago car. Pursuant to that investigation, he had occasion to proceed to 2944 North Clybourn, Chicago, Illinois, where Mr. Santiago pointed out the defendant and said that he was just in the stolen car. The defendant was placed under arrest approximately a block from the stolen vehicle. Defendant was given his constitutional Miranda warnings, after which he stated that he did not steal the car. A search of the defendant revealed the keys to the automobile and the identi-



fication for the vehicle in the defendant's pocket. When asked why he had the keys to the car in his pocket, defendant said that he had picked them up.

Defendant's first contention on appeal is that he did not knowingly and understandingly waive his right to a trial by jury. In People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397, the Supreme Court held that a defendant normally speaks through his attorney and that by permitting his attorney, in his presence and without any objection, to waive his right to a jury trial, the defendant acquiesces in and is bound by his attorney's conduct. The rule as announced in Sailor is applicable to court-appointed counsel. People v. Gray, 14 Ill.App.3d 1022, 304 N.E.2d 111; People v. McClinton, 4 Ill.App.3d 253, 280 N.E.2d 795.

In the case at bar, defendant's case was specifically passed to allow the public defender to consult with him. When the case was recalled, the public defender said, "Jury waived; plea of not guilty." Defendant's actions in permitting his attorney, in his presence and without any objection, to waive his right to a jury trial and then enter a plea of not guilty, constitutes a valid jury waiver binding upon defendant.

Defendant's second contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the State failed to prove ownership of the vehicle allegedly trespassed. For a conviction on the charge of criminal trespass to a vehicle, ownership is a material element which must be alleged and proven. The primary purpose of this requirement is to enable the accused to prepare for trial and to plead acquittal or conviction in a bar for subsequent prosecution for the same offense. People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404; People v. Hurley, 10 Ill.App.3d 74, 293 N.E.2d 341.

In the case at bar, the complaint alleged that the vehicle was the property of Jose Santiago. At trial, the



testimony of Ray Santiago established that the car was in fact the property of the Santiago family, of which Jose Santiago was a member, and that defendant did not have authority to enter the car. This testimony was introduced without any objection by defendant. Defendant has not demonstrated how he was in any way prejudiced by the variance between the indictment and the proof. The purpose of the allegation and proof of ownership has been realized in that the allegations of the complaint were sufficient to enable defendant to prepare his defense at trial and to plead double jeopardy. Under these circumstances, the variance was harmless. People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. JUSTICE MEJDA did not participate.





30

CHICAGO BAR  
JUN 3 1974  
ASSOCIATION

v.

JAY WILLIAM SHUTTER, )  
 ) HONORABLE  
 ) ANTHONY J.  
 Defendant-Appellant.) PRESIDING.

PER CURIAM\* (FIRST DISTRICT, FIFTH DIVISION):

Defendant was found guilty after a bench trial of the offense of failure to possess a firearm owner's identification card in violation of Section 83-2(a) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 83-2(a)). He was placed on probation for a period of two years with the condition that the first six months be served in the House of Correction. Defendant appeals, arguing that he did not knowingly and understandingly waive his right to a trial by jury and that the trial court erred in denying his motion to suppress evidence.

At the motion to suppress and at trial, the following evidence was adduced: Chicago Police Officer White testified, as a witness for the State, that on August 30, 1972, he stopped a 1966 Buick near 87th and State Street, Chicago, Illinois, because the car had a cracked windshield and the driver made a right turn without signalling. The driver of the car, Willie Lawrence, was unable to produce a valid driver's license or any identification for the vehicle. Defendant was a passenger in the vehicle. Officer White then looked under the hood of the car for the vehicle identification number. At that time he observed a gun which he recovered and which was subsequently introduced into evidence. After being given his constitutional Miranda warnings, defendant admitted that the gun belonged to him. A search of defendant did not reveal an Illinois State firearm owner's identification card, and defendant

\* Judge Barrett did not participate.



admitted that he did not have an Illinois State firearm owner's identification card.

Defendant testified that on August 30, 1972, he was a passenger in a car at 87th and State Street when the car was stopped by Chicago Police officers. Willie Lawrence was driving the car and was unable to produce a driver's license. The officers asked defendant to get out of the car and asked for his identification. The officers first searched the inside of the car. The officers then searched under the hood of the car and found a gun. He did not tell Officer White that the gun belonged to him, but at the police station he told Detective Vokac that the weapon belonged to him.

#### Opinion

Defendant's first argument on appeal is that he did not knowingly and understandingly waive his right to a trial by jury. The record demonstrates that prior to trial counsel was appointed to represent defendant. After a motion to suppress was heard and denied, defense counsel made the following statement in the presence of defendant:

"MR. GETTER: Plea of not guilty, jury waived."

In People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397, the Illinois Supreme Court held that a defendant normally speaks through his attorney, and that by permitting his attorney, in his presence and without objection, to waive his right to a jury trial, the defendant acquiesces in and is bound by his attorney's conduct. The rule, as announced in Sailor, is applicable to court appointed counsel. People v. McClinton, 4 Ill. App.3d 253, 280 N.E.2d 795; People v. Irving and Pass, 15 Ill. App.3d 563, 304 N.E.2d 655.

In the case at bar appointed counsel had obviously conferred with defendant prior to the jury waiver as evidenced by counsel's



conduct at the motion to suppress, at which defendant testified and at which counsel made an extensive argument. Defendant's action in permitting his attorney, in his presence and without any objection, to waive his right to a jury trial and enter a plea of not guilty, constitutes a valid jury waiver, binding upon defendant.

Defendant's second contention is that the trial court improperly denied his motion to suppress. After the motion to suppress was heard, the trial judge made certain findings of fact. He found that Officer White stopped the vehicle in question for an ordinary traffic violation, that the occupants were unable to produce any driver's license or any identification for the vehicle, and that in order to determine ownership of the vehicle, the officer looked under the hood to ascertain the serial number and then found the gun.

When the car in which defendant was a passenger was stopped for a traffic violation, the driver of the vehicle was unable to produce a valid driver's license or any identification for the vehicle. Defendant in his brief concedes that the arresting officer had a valid reason to suspect that he was dealing with more than an ordinary traffic offender. The police officers with this knowledge were fully justified in seeking to ascertain ownership of the vehicle. To this end the officers properly lifted the hood of the vehicle to observe the vehicle's identification number. Upon doing so the officers observed in plain view the weapon in question. The inspection of the motor vehicle number for purposes of identifying the vehicle is not a search. (People v. Wolf and Beard, 15 Ill. App. 3d 374, 304 N.E.2d 512; United States v. Johnson, 431 F.2d 441; United States v. Jones, 432 F.2d 773; United States v. Williams, 434 F.2d 681; Cotton v. United States, 371 F.2d 385.) Objects in plain view of police officers, who have a right to be in the position to have that view, are subject to





seizure and are admissible in evidence. (People v. George, 49 Ill.2d 372, 274 N.E.2d 26; People v. Dodson, 11 Ill.App.3d 709, 297 N.E.2d 367.) Under the circumstances of this case, the finding of the weapon did not constitute a search, and the motion to suppress was properly denied.

Although not argued by either side in their briefs, we have noted that defendant's sentence violates the Unified Code of Corrections as it was originally enacted. Since defendant's case has not yet reached the stage of final adjudication, the Unified Code of Corrections is applicable. (People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) Defendant was placed on probation for a period of two years with the condition that he spend the first six months in the House of Correction. The Unified Code of Corrections as originally enacted provides that when a defendant is placed on probation, he can be committed to a period of imprisonment only under Article VII (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-6-3(d)). Article VII of the Unified Code of Corrections provides only for periodic imprisonment. (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-7-1.) Here the condition that the defendant spend the first six months in the House of Correction is improper and must be vacated. People v. Claudio, 13 Ill. App. 3d 537, 300 N.E.2d 791.

We are aware that the Unified Code of Corrections has been amended by Public Act 78-939 to provide that a defendant may be imprisoned as a condition of probation for up to six months. However, since this act does not provide an effective date, it would not be effective until July 1, 1974 (1970 Illinois Constitution, Article IV, Section 10). People ex rel. Klinger v. Howlett, 50 Ill.2d 242, 278 N.E.2d 84.

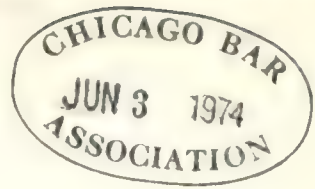
The judgment is affirmed and defendant's sentence is modified by eliminating the condition that he serve the first six months in the House of Correction.

JUDGMENT AFFIRMED, SENTENCE MODIFIED.

Abstract only.







No. 59178

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
	)	
v.	)	
	)	
WILLIAM BROWN,	)	HONORABLE
	)	JOSEPH A. SOLAN,
Defendant-Appellant.)	)	JUDGE PRESIDING.

PER CURIAM:\* (First District, Fifth Division)

Defendant pled guilty to charges of armed robbery, in violation of Section 18-2, and aggravated battery, in violation of Section 12-4 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, pars. 18-2, 12-4) and was sentenced to concurrent terms of five to ten years on each charge.

The sole issue on appeal is whether the trial court erred in providing that said sentences should run concurrently.

When this case was called for trial, defendant withdrew a previously entered plea of not guilty and entered a plea of guilty. The parties then entered into a stipulation of facts showing that Gesch Never was attempting to enter her apartment when she was approached by defendant, who attempted to take her purse. When she struggled, defendant struck her about the head with a metal pipe and knocked her to the ground. He then took her purse and fled. She had injuries to her face requiring sutures which left marks of permanent disfigurement.

Relying upon the cases of People v. Baker, 114 Ill.App. 2d 450, 252 N.E.2d 693, and People v. Boyd, 105 Ill.App.2d 345, 245 N.E.2d 587, defendant argues that the taking of the purse and the striking with a pipe were not independently motivated, and because the offenses of attempted robbery and aggravated battery were part of the same transaction, a conviction for both is improper, and the judgment for aggravated battery should be reversed.

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\* Mr. Justice Barrett did not participate.



The law is clear that where the conduct of the defendant, which constituted more than one offense, was part of a single transaction, only one sentence for the greater offense may be imposed. People v. Whittington, 46 Ill.2d 405, 265 N.E.2d 679; People v. Redding, 12 Ill.App.3d 150, 298 N.E.2d 238 (Abst. opinion). In the case at bar, it is apparent that the striking of Miss Never and the taking of her purse were part of the same transaction and, therefore, the crime of aggravated battery should be merged with the crime of armed robbery.

The question remains, however, whether both the conviction and the sentence for aggravated battery must be reversed, as urged by the defendant, or whether the conviction should stand and only the sentence for aggravated battery be vacated. This question is presently pending before the Illinois Supreme Court in the case of People v. Lilly, No. 45788, which was taken on leave to appeal by that court in the May, 1973 Term. That case is an appeal from People v. Lilly, 9 Ill.App.3d 46, 291 N.E.2d 207, where the court held that the judgment for the lesser crime should stand and only the sentence vacated. The Third District reached a contrary decision in People v. Clelland, 12 Ill.App.3d 912, 299 N.E.2d 48. In People v. Richerson, No. 58539, the First Division, on January 14, 1974, held that the judgment for the lesser crime should stand but the sentence should be vacated.

In light of the foregoing, until there is a decision by the Illinois Supreme Court in the Lilly case, the decision in the Lilly and Richerson cases should be followed, and, accordingly, the judgment of conviction and the sentence imposed for armed robbery are affirmed; the judgment of conviction of aggravated battery is affirmed, but the sentence imposed thereon is vacated.

Judgments of conviction affirmed.

Sentences vacated in part.

Publish abstract only.





No. 59434

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
	)	
v.	)	
	)	
WESLEY WASHINGTON,	)	HONORABLE
	)	IRWIN COHEN,
Defendant-Appellant.)	)	JUDGE PRESIDING.

PER CURIAM\* (First District, Fifth Division):

After a bench trial, defendant was found guilty of battery, resisting arrest, unlawful use of weapons and failure to possess an Illinois State firearm owner's identification card (Ill. Rev. Stat. 1971, ch. 38, pars. 12-3, 24-1(a), 31-1, 83-2). He was sentenced to two years probation, with the condition that he receive psychiatric outpatient care. On appeal he contends that the evidence was insufficient to establish his guilt beyond a reasonable doubt and that the complaint charging him with resisting arrest was insufficient.

At trial, Albert Pohl, a Chicago police officer, testified for the State that he received a call of a disturbance and, upon arrival, he spoke to Lonnie Austin, who told him a man with a gun was on the premises. He and other officers searched the premises and discovered defendant in a passageway in that building. Defendant pulled a .25 caliber automatic pistol from his pocket, and as the officers attempted to disarm defendant, he picked up and swung a metal stool which eventually hit one of the officers. He was finally subdued, and a search revealed two knives and a blackjack in his possession. When arrested, defendant appeared to be acting in an irrational manner, but after arrival at the police station, his actions were rational. Pohl also testified that defendant was unable to produce an Illinois State firearm owner's identification card.

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\* Mr. Justice Barrett did not participate.







Ronald Esposito, a Chicago police officer, was called to testify for the State and, after stating he was the partner of Officer Pohl, defense counsel stipulated that his testimony would be the same as that of Pohl. In addition, Esposito testified that as he approached defendant in the gangway, defendant reached into his pocket and pulled out a .25 caliber automatic pistol. A struggle ensued, during which he obtained the gun, but defendant broke loose and began to swing the stool at the officers. Esposito was struck on the right side of his body and suffered several cracked ribs.

Defendant testified that he did not remember the date that he was arrested but that after his arrest, he was sent to see a doctor and subsequently taken to the hospital. He did not remember seeing Officer Pohl or Officer Esposito but did remember that an officer asked for his gun. He handed it over, and the police officers then began to beat him. He denied swinging a stool at the officers. He also stated that when the police officers approached, he already had his gun out.

Defendant's first argument on appeal is that he was not proven guilty beyond a reasonable doubt because the State did not prove that he was sane at the time of the commission of the alleged acts. The law presumes all men to be sane. People v. Lono, 11 Ill.App.3d 443, 297 N.E.2d 349. The affirmative defense of insanity at the time of the crime must be raised at the trial. Once evidence of insanity is introduced, the presumption ceases and the State has the burden of proof beyond a reasonable doubt that defendant was reasonably sane at the time of committing the crime. People v. Lemay, 35 Ill.2d 208, 220 N.E.2d 184. If defendant fails to meet the burden imposed by law and does not introduce sufficient evidence to raise a reasonable doubt as to his sanity, the presumption of sanity will remain. People v. Turner, 2 Ill.App.3d 11, 275 N.E.2d 742.



In the case at bar, no psychiatrist or psychologist testified. The only State testimony as to defendant's mental condition was from the officers who stated that when arrested defendant seemed to be acting in an irrational manner. Officer Pohl, however, testified that upon arrival at the station defendant's behavior was rational and coherent. Evidence that a defendant is disturbed in mind or has indicated idiosyncratic behavior or irresponsible conduct is insufficient to raise the issue of insanity. People v. Lono, 11 Ill.App.3d 443, 297 N.E.2d 349. The only testimony in this regard was defendant's statement that he did not remember being arrested. It is noted, however, that defendant testified he was beaten by the police officers and that he did not swing a stool at the officers. The credibility of the defendant is for the trier of fact to determine. People v. Turner, 2 Ill.App.3d 11, 275 N.E.2d 742.

Defendant, in his brief here, argues that shortly after his arrest in April, 1973, he was examined by a doctor from the Psychiatric Institute, found to be in need of mental treatment, and was committed to the Chicago Reed Hospital and subsequently released about four weeks later. He points out that, at age 13, he spent five years in a mental hospital. These matters were not testified to at trial, but were raised in colloquy prior to trial and during the hearing in aggravation and mitigation. Dr. Dederick, who examined at the Psychiatric Institute, was not called as a witness during the trial but did testify at the hearing in aggravation and mitigation that at the time of her examination on April 23, 1973 (four days after his arrest), defendant was schizophrenic but oriented as to time, place and person. A reference was made to her report by defense counsel, but it was not offered into evidence. From our review of the record, we conclude that defendant failed to introduce sufficient evidence of insanity so as to shift the burden of proof to the State, and



we believe that the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant's second argument is that the charge of resisting arrest was insufficient to support a conviction. He relies upon People v. Leach, 3 Ill.App.3d 389, 279 N.E.2d 450, in support of his contention that the complaint here fails to specify any physical acts of defendant constituting the offense of resisting arrest. The State, in its brief, concedes that the complaint charging defendant with resisting arrest was insufficient. We agree, based on the reasoning of Leach, that the complaint charging defendant with resisting arrest was insufficient and that the conviction on that charge should be reversed.

For the reasons stated, the judgment of conviction for resisting arrest is reversed. The remaining judgments of conviction and the sentence are affirmed.

Affirmed in part.

Reversed in part.

Publish abstract only.

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No. 59289

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY
	)	
v.	)	
	)	
CLIFTON SHEPPARD,	)	HONORABLE
	)	JOSEPH A. POWER,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM\* (First District, Fifth Division):

Petitioner appeals from the denial of his post-conviction petition. He was originally charged by separate indictments with eight charges of armed robbery, one of attempt murder, one of attempt robbery, one of aggravated battery and one of theft. On April 29, 1968, he withdrew his previously entered pleas of not guilty and entered pleas of guilty to the indictments and was sentenced to terms of 10 to 30 years on the armed robbery charges, one to twenty years on the attempt murder charge, one to ten years on the aggravated battery charge, one to fourteen years on the attempt robbery charge and one to ten years on the theft charge, all sentences to run concurrently. He did not appeal these convictions.

On June 4, 1971, he filed a pro se post-conviction petition and counsel was appointed to represent him. An amended post-conviction petition was filed alleging that petitioner's pleas of guilty were the result of (1) a coerced confession and (2) an unfulfilled promise of leniency by the State. After the trial court dismissed the first allegation without an evidentiary hearing, an evidentiary hearing was held on the second. At the hearing the following testimony was adduced.

Petitioner testified that on April 29, 1968, he was convicted upon his pleas of guilty, along with James Carroll and Marshall Smith, that he was represented by assistant public defender Edward Downs, that the prosecutors in the case were Walter Parrish and Ronald Magnes, that he spoke with both assistant state's attorneys and his counsel in the bullpen behind Judge Stark's courtroom on April 18, 1968, that the

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Mr. JUSTICE BARRETT did not participate.





assistant state's attorney told him that after a trial he would get 20 to 40 years, and that he told the assistant state's attorneys that he would plead guilty if he could get 10 years.

On April 29, 1968, his counsel and the assistant state's attorneys had another conversation in the bullpen behind Judge Stark's courtroom and he again requested a sentence of 10 years. Later that same day, the parties met in Judge Stark's chambers. As they were leaving one of the assistant state's attorneys said, "All right. Well, we're going to give you ten years." He then entered pleas of guilty, believing that he would receive a sentence of ten years.

James Carroll and Marshall Smith, petitioner's co-defendants, gave testimony substantially similar to that of the petitioner.

Edward Joseph Downs testified for the State that in 1968, he was the assistant public defender who represented Clifton Sheppard, James Carroll and Marshall Smith in their cases before Judge Harry Stark and that there were plea discussions made at the defendant's insistence. On April 29, 1968, when the case was called, a conference was held at the request of the defendants. A sentence of 20 to 40 years was offered and defendants turned down the offer. A second conference was requested by the defendants and resulted in an offer of a sentence of 10 to 30 years. After the conference he conferred privately with the defendants and they indicated to him that they wished to plead guilty for a sentence of 10 to 30 years. He testified that he had each of the defendants, in his presence, sign the half sheet, stating that they were entering pleas of guilty in return for sentences of 10 to 30 years. The half sheet was introduced into evidence. The defendants then entered pleas of guilty and were sentenced to a term of 10 to 30 years.

Petitioner was recalled to testify and denied that it was his signature on the half sheet.

Odessa Sheppard, the mother of Clifton Sheppard, testified in rebuttal that on April 29, 1968, Downs told her that if her son entered pleas of guilty, he would not get any more than 10 years.

#### OPINION

Petitioner's first argument on appeal is that the trial court



erred in dismissing his amended post-conviction petition without an evidentiary hearing on the allegation that his plea of guilty was the result of an illegally obtained confession.

In People v. Thomas, 41 Ill. 2d 122, 242 N.E.2d 177, petitioner appealed the dismissal of his post-conviction petition without an evidentiary hearing. On appeal, the petitioner argued that his plea of guilty was involuntary because it was the result of a coerced confession. The Supreme Court rejected that contention, holding:

"Moreover, in the present case the defendant was convicted upon his pleas of guilty, and despite the allegations of the defendant's post-conviction petition, it appears from the record before us that those pleas were voluntary. They were entered more than three months after his alleged confession, and after lengthy consultation with his attorney."

See also People v. Smith, 42 Ill. 2d 516, 251 N.E.2d 721, 252

N.E.2d 665.

In the case at bar, over three months had elapsed between the alleged coerced confession and petitioner's pleas of guilty. During this three month period, petitioner was represented by counsel and had numerous conferences with him. Petitioner has completely failed to demonstrate any causal relationship between the alleged coerced confession and his pleas of guilty entered three months later. The trial judge properly ruled that petitioner was not entitled to an evidentiary hearing on this allegation of his post-conviction petition.

Petitioner's second argument is that the evidence adduced at the hearing on his amended post-conviction petition established that his pleas of guilty were obtained as a result of an unfulfilled promise by the State. In a post-conviction proceeding, the credibility of witnesses, as in other cases tried by the court without a jury, is a matter for the trial judge to determine and his determination will not be reversed on appeal unless it is manifestly erroneous. People v. Bracey, 51 Ill. 2d 514, 283 N.E.2d 685; People v. Stone, 45 Ill. 2d 100, 256 N.E.2d 803.

In the case at bar, the testimony of Edward Downs, petitioner's counsel, established that at the petitioner's insistence he entered into plea negotiations. After several conferences, the trial court agreed to





sentences of 10 to 30 years and the defendants were all apprised of this fact. Downs testified that prior to the entry of their pleas of guilty he had all three defendants, in his presence, write on the half sheet that they agreed to pleas of guilty in return for sentences of 10 to 30 years. Downs was specific that he informed defendants of the sentences they would receive prior to the entry of their pleas of guilty. The testimony of Downs was contradicted by that of defendant and his two co-defendants and of Odessa Sheppard. The trial judge, in denying petitioner's post-conviction petition and referring to his testimony and that of the two co-defendants, stated:

"They failed to satisfy me that this incident occurred, that they received a promise of a 'ten year' max."

After a complete review of the entire record, we cannot say that the trial judge's determination was erroneous.

We have also noted that the record contradicts petitioner's assertion that he expected a sentence of 10 years. At his pleas of guilty, petitioner demonstrated no surprise upon receiving a sentence of 10 to 30 years. Petitioner made no motion to withdraw his pleas and did not attempt to appeal his conviction or file a post-conviction petition for over three years. People v. Pineda, 9 Ill. App. 3d 1014, 293 N.E.2d 650; People v. Gaines, 48 Ill. 2d 191, 268 N.E.2d 426.

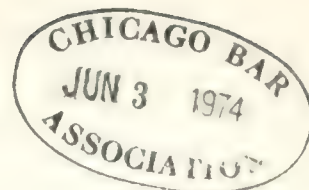
Accordingly, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]







58533

PEOPLE OF THE STATE OF ILLINOIS, )	
Plaintiff-Appellee, )	APPEAL FROM THE CIRCUIT
vs. )	COURT OF COOK COUNTY.
ELIAS NATAL, )	
Defendant-Appellant. )	HON. ARTHUR L. DUNNE,
	Presiding.

\*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Following a bench trial, the defendant, Elias Natal, was convicted of aggravated battery. (Ill. Rev. Stat. 1969, ch. 38, par. 12-4(b)(1).) He was admitted to three years' probation on the condition that he serve the first four months in the Work Release Program.

On appeal, he contends: (1) the State did not prove his guilt beyond a reasonable doubt; and (2) the sentence should either be modified to eliminate the four months on work release or the case should be remanded to specify the conditions under which the defendant may be allowed to care for his disabled common law wife while serving the sentence.

Hector Collazo testified for the State that on November 14, 1971, at 931 North Kedzie, at about 2:00 A. M., the defendant was "talking bad" about his brother and said he was going home to get a gun and would return. About a half hour later, the defendant jumped on him and cut him with a razor and he passed out. No one in the tavern hit the defendant or had a weapon. On cross-examination, he testified his brother used to work at the tavern and the defendant had caused his brother, Jose, to be arrested about four to six weeks earlier. He left the bar with Tony Velez, a friend who was going to drive him home. He did not see Alfonso Arce, the victim, outside.

\*Mr. Justice Burke did not participate.



Alfonso Arce testified for the State through an interpreter that on November 14, 1971, he went to 931 North Kedzie at about 2:00 A. M. At 3:00 A. M., when they were going to close the tavern, he purchased some beer and, leaving the tavern, he saw the defendant on top of Collazo, cutting him with a razor. While trying to stop defendant from cutting Collazo, he was cut by the razor on his right thumb. He did not have an argument or any words with the defendant and, except for the defendant, he did not observe anyone with a weapon. He was admitted to Walther Memorial Hospital for seven days and lost the use of his thumb. On cross-examination, he stated the defendant and Collazo were having an argument in the tavern and went outside together. When asked at whom the defendant was looking at the time of the injury, the interpreter's answer was, "Yes, he turned around and I looked at him and that is when he cut him." He was not trying to grab the razor from the defendant, and at no time did he touch the defendant.

Chicago Police Officer Walter Wojciechowski testified that on November 14, 1971, he went to Walther Memorial Hospital and spoke to Arce through Tony Velez, who acted as interpreter. He later arrested the defendant at his home and, after being advised of his constitutional rights, the defendant said he had no knowledge of the incident. The officer testified he observed blood along the curb outside of the tavern, but there was no indication that fighting had taken place inside the tavern.

The defendant, Elias Natal, testified in his own behalf that on November 14, 1971, he was a barber for Montgomery Ward. At about 11:00 P. M. that night, he went to the Spot Lounge, 931 North Kedzie. He previously had trouble with Hector Collazo's brother, Jose, and had signed a criminal complaint against him. Hector Collazo had been drinking and had his brother's gun.



Tony Velez, Hector's "buddy", took the gun away from him and locked it in the trunk of his car. Hector then "started crazy fighting, pushing people" and grabbed defendant. Four or five men armed with pool sticks also jumped on defendant and beat him. He was hit several times and fell down. Arce was one of the men hitting and beating him in the fight. Defendant took a razor from his barber's jacket so he could "try to chase them people out of my way." He didn't think he cut anybody and went home. When asked if Arce came out and tried to get him off Collazo, he answered, "That's a bunch of lies."

Defendant contends that the State's evidence showed that Arce, in trying to intervene between him and Collazo, brushed against the razor and cut himself and did not suggest defendant deliberately cut Arce. At most, he contends the evidence showed recklessness on his part. From Arce's remark at the beginning of his testimony, that he "stuck" himself, defendant maintains the injury to Arce was accidental. However, this overlooks Arce's later testimony that the defendant turned around and looked at him and then "cut him." Arce specifically denied that he was reaching for the razor when the defendant cut him. Arce's testimony must be viewed in its entirety. This evidence showed beyond a reasonable doubt that the defendant knowingly and intentionally used his razor to cut the victim. The defendant's evidence and Arce's evidence were completely different. Nevertheless, the trial judge resolved this conflict against the defendant. The credibility of witnesses and the weight to be given their testimony is generally better left to the trial judge who sees and hears the witnesses. His decision will be disturbed only where the "evidence is so palpably contrary to the finding or so unreasonable, improbable or unsatisfactory as to cause reasonable doubt as to the guilt of the accused."

People v. Reese, 54 Ill. 2d 51, 58, 294 N. E. 2d 288.





Defendant's claim that he acted in self-defense was also a question of fact for the trial judge and his finding was amply supported by the evidence. People v. Rodriguez, 129 Ill. App. 2d 1, 8, 262 N. E. 2d 815.

Defendant next contends that the State's failure to call Tony Velez, who witnessed the altercation, or explain his absence, created a reasonable doubt of the defendant's guilt. However, the State need not call every witness to an offense. The court stated in People v. Wooden, 9 Ill. App. 3d 310, 312, 292 N. E. 2d 236:

It is well settled that the State is not obligated to produce every witness to a crime, and the failure on the part of the State to produce a witness does not create a presumption that his testimony, if presented, would be unfavorable to the prosecution.

Finally, defendant argues that the four months' sentence to the House of Correction on the Work Release Program should be eliminated since he was gainfully employed at two jobs. Further, he had no previous arrest and serving the sentence would cause hardship to him and his common law wife, Edwina Perez, who is disabled and dependent upon him. Nevertheless, in view of the severity of the crime, we do not find the sentence excessive. We note that the trial judge has already reduced the time of periodic imprisonment from six to four months.

However, we will remand the cause to the trial court so that the conditions of periodic imprisonment may be spelled out under the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1005-7-1(e)) so as to allow defendant sufficient time each day to care for Edwina Perez.





The judgment is affirmed and the cause is remanded to the trial court with directions to amend the mittimus in accordance with the directions herein expressed.

Judgment affirmed,  
cause remanded.

(Abstract Only).





59195

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
v.	)	
	)	
JULIO CORTES,	)	HONORABLE
	)	KENNETH R. WENDT,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM\* (FIRST DIVISION, FIRST DISTRICT):

Julio Cortes, defendant, and Jose Gutierrez were charged with aggravated battery, in violation of Section 12-4 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 12-4). After a bench trial, the defendant was found guilty and placed on probation for five years, with the first six months thereof to be served in the House of Correction. Jose Gutierrez was found guilty and sentenced to not less than one year nor more than three years in the Illinois State Penitentiary. Defendant appeals.

The issues on appeal are whether the provision that the defendant spend the first six months in the House of Correction as a condition of his probation is valid, and whether the sentence of five years probation is excessive.

The record discloses that on May 29, 1970, Reverend Leroy Griffin and a friend of his, Mrs. Jean Peters, were walking to his car, when they noticed a group of about eight men walking behind them. Rev. Griffin testified that the defendant walked up behind him, grabbed him by the arm and said, "Nigger, where are you going?" Rev. Griffin shook him off. The co-defendant, Jose Gutierrez hit Rev. Griffin on the head with an 18-inch metal pipe. The defendant kicked Rev. Griffin in his side four or five times when he fell to the ground, and Rev. Griffin then "blackened out." The injuries sustained by Rev. Griffin required thirteen stitches.



Mrs. Peters, who was pregnant at the time, began running down the street away from the assailants. The defendant and Gutierrez pursued Mrs. Peters, who was able to escape to a store to summon help. Before Mrs. Peters was able to escape, Gutierrez pulled on her blouse and said, "I want this bitch."

Mrs. Peters, after running back to the store and summoning help, went onto the street with her brother and some other people who were in the store. Mrs. Peters saw the boys running through an alley. Rev. Griffin was walking towards her with blood all over his face. The police arrived shortly afterwards and Rev. Griffin was taken to a hospital.

On June 9, 1973, Rev. Griffin saw the defendant and Gutierrez on the street in the vicinity where the attack occurred. Rev. Griffin went home and called the police. He pointed out the defendant and Gutierrez as the men who had assaulted him and they were arrested. Mrs. Peters also identified the defendant and Gutierrez as the assailants.

The defendant argues that under Section 5-6-3 of the Unified Code of Corrections his sentence is improper and that he may not be sentenced to a period of imprisonment as a condition of probation. Since defendant's case has not reached the stage of final adjudication, the Unified Code of Corrections is applicable. (People v. Chupich, 53 Ill. 2d 572, 295 N.E. 2d 1; People v. Harvey, 53 Ill. 2d 585, 294 N.E. 2d 269.) Here, the defendant was sentenced to five years probation with the condition that the first six months be served in the House of Correction, a so-called "split-sentence." Section 5-6-3(d) of the Unified Code of Corrections (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-6-3) provides:

"The court shall not require as a condition to the sentence of probation or conditional discharge





that the offender be committed to a period of imprisonment except under Article 7."

Article 7 provides only for periodic imprisonment and is not applicable to the type of sentence imposed here.

The People argue that Section 5-6-3(d) is unconstitutional because it violates the constitutional mandate on separation of powers, is an arbitrary exercise of legislative power, and violates Article 1, Section 10, of the 1970 Illinois Constitution. In People v. Ortiz, \_\_\_ Ill. App. 3d \_\_\_, 305 N.E. 2d 418, the court reviewed similar arguments and held Section 5-6-3(d) constitutional. Also see People v. Braddock, No. 58584, January Term, 1974. We adhere to that conclusion.

In the case at bar, the condition that the defendant serve the first six months in the House of Correction is improper under Section 5-6-3(d) of the Unified Code of Corrections and must be vacated.

The defendant also argues that the sentence of five years probation is excessive and that this court should impose a sentence of conditional discharge in accordance with the provisions of Section 5-6-1(b) of the Unified Code of Corrections (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-6-1(b)). The defendant states that he has no prior criminal record; that his scholarship and attendance at high school were good and at the time of the trial he was a student at the University of Illinois Chicago Circle Campus; that his entire social, educational and family background indicate that he is highly susceptible to rehabilitation; and that the sentence will substantially and unduly interfere with his education and breed bitterness and discouragement in a young man who is a model of rehabilitation potential. The People argue that the defendant committed a very serious crime; that he stood by while Gutierrez mercilessly clubbed Rev. Griffin on the head with a metal pipe; and that the defendant kicked Rev. Griffin in the side



four or five times after the clergyman fell to the ground, causing him to "black out."

The sentence of five years probation was not in excess of the statutory maximum set by the statute in effect at the time of the incident (Ill. Rev. Stat. 1971, ch. 38, par. 117-1(a)(3)(b)) or under the Unified Code of Corrections, where the offense of aggravated battery is made a Class 3 felony (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 12-4). Section 5-6-2(b)(1) provides that the maximum period of probation for a felony shall not exceed five years (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-6-2). Therefore, the five years sentence of probation in the case at bar is within the statutory maximum. (People v. Brouillette, 92 Ill. App. 2d 168, 236 N.E. 2d 12.) One convicted of a crime has neither the inherent nor constitutional right to probation and the grant or refusal of probation rests in the sound discretion of the trial court. People ex rel. Ward v. Moran, 54 Ill. 2d 552, 301 N.E. 2d 300; People v. Harvey, 9 Ill. App. 3d 944, 293 N.E. 2d 406; People v. Henderson, 2 Ill. App. 3d 401, 276 N.E. 2d 372.

There is no indication that the trial court abused its discretion in sentencing the defendant to a period of five years probation and, therefore, the sentence will not be disturbed. People v. Spicer, 47 Ill. 2d 114, 264 N.E. 2d 181.

The sentence of probation is modified by eliminating the condition of imprisonment in the House of Correction and, as modified, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed, as modified.

\* Goldberg, J., did not participate.



18 I.A.<sup>3d</sup> 960



59418

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.	)	
	)	
CLIFFORD BINDER,	)	HONORABLE MARVIN E. ASPEN,
	)	Presiding.
Defendant-Appellant.	)	

PER CURIAM \* (First District, First Division):

Clifford Binder, defendant, was found guilty after a jury trial of the offense of attempt burglary (Ill.Rev.Stat. 1971, ch. 38, par. 8-4) and sentenced to a term of three to nine years. He contends: (1) that the evidence was insufficient to support his conviction beyond a reasonable doubt; (2) that the trial court erred in instructing the jury; and (3) that the State's closing argument was improper, inflammatory and prejudicial.

Norman Brozynski, a Chicago Police Investigator, testified that on August 20, 1972, he was working with his partner, David Gould. They were on a stake-out positioned at the rear of 2720 W. Birchwood, Chicago, Illinois. At approximately 2:00 a.m., they observed the defendant walking westbound down the alley of Birchwood. The defendant entered the yard at 2716 W. Birchwood and walked over to the side door of the garage. Brozynski left his vehicle and positioned himself behind some bushes approximately 20 feet away from the defendant, who turned the knob of the garage door and attempted to open it. When the door did not open, the defendant again turned the door knob and hit the door with his left shoulder. When this also failed to open the door, the defendant walked around to the overhead door and attempted to lift it up. When that door would not open, he turned and walked southbound through the driveway out of the yard at 2716 Birchwood and entered the yard at 2721 Birchwood, where he was placed under arrest. He lived in Glenview, Illinois. He was advised of his constitutional Miranda warnings and when asked what he was doing in the

\* Mr. Justice Goldberg did not participate.





yard at 2716 Birchwood he replied that he was just walking through. When asked if he attempted to enter the garage, he answered, "Yes, but I didn't get in."

It was stipulated that if Mark Steinman were called to testify, he would testify that on August 20, 1972, he owned the home and garage at 2716 Birchwood, Chicago, Illinois. He did not at any time give the defendant permission to enter the garage at that address.

The defendant's first contention is that the evidence was insufficient to support his conviction beyond a reasonable doubt because his actions did not constitute a substantial step towards the commission of a burglary and that the evidence was insufficient to establish intent to commit a burglary. While intent is a necessary element of the offense, it may and often must be proven circumstantially by inferences drawn from the facts of the individual case. (People v. Reynolds, 131 Ill.App.2d 348, 268 N.E.2d 545.) Here, the evidence demonstrated that at 2:00 a.m. the defendant walked through an alley and into the yard at 2716 W. Birchwood. He walked to the side door of the garage, tried the doorknob and, finding the door locked, hit the door with his shoulder in an attempt to open it. When the attempt failed, he walked around to the front of the garage and attempted to lift the overhead door. His actions were sufficient to constitute a substantial step toward the commission of the offense. After being arrested, defendant admitted that he tried to gain entry into the garage. Based upon all of the evidence, the jury was justified in finding, from defendant's actions, that he intended to commit a burglary.

The defendant's second contention is that the trial court erred in instructing the jury on the elements of the offense. He argues that the giving of People's Instruction No. 9, which was IPI Criminal 6.07, was improper, relying upon People v. Woodard, 7 Ill.App.3d 607, 288 N.E.2d 72. In Woodard, the appellate court held that the indictment must allege the specific intent to commit a felony within the premises. That case, however, has subsequently been overruled by the





Illinois Supreme Court. (People v. Woodard, 55 Ill.2d 134, 302 N.E. 2d 62.) There, the Supreme Court held that in an indictment for attempt burglary, all that must be alleged is the intent to commit burglary and an overt act constituting a substantial step toward the commission of that offense. In this case, People's Instruction No. 9, IPI Criminal 6.07, stated all of the necessary elements of the crime of attempt burglary and was properly given by the trial court.

In this regard, defendant also argues that the jury was improperly instructed on the law of circumstantial evidence. The jury was given IPI Criminal 3.02 regarding the law of circumstantial evidence. Defendant now urges that the failure of the trial court to give the defense tendered instruction, which included the last paragraph of IPI Criminal 3.02, was error. That paragraph states:

"You should not find the defendant guilty unless the facts and circumstances exclude every reasonable theory of innocence."

The Committee Comments make it clear that this paragraph should "be given only where the proof of guilt is entirely circumstantial."

See People v. Beck, 133 Ill.App.2d 356, 273 N.E.2d 169.

In this case, a Chicago Police Investigator testified that he observed the defendant attempt to open the side door of the garage at the rear of 2716 W. Birchwood. When the door did not open, the defendant hit the door with his left shoulder. He also tried to open the overhead door. After being taken into custody, he was advised of his constitutional rights and thereafter admitted that he tried to gain entry into the garage. His admission is a type of confession and can, of itself, be considered direct evidence.

(People v. Brooks, 7 Ill.App.3d 767, 289 N.E.2d 207.) Here, there was direct evidence of the defendant's guilt from both his admission and the observations of Chicago Police Investigator Brozynski. Since the evidence against the defendant was not entirely circumstantial, the the second paragraph of IPI Criminal 3.02 was properly refused by the trial court.



The defendant's final contention is that the closing argument of the State was improper, inflammatory and prejudicial. The defendant's privately retained counsel filed an eight-page, detailed written motion for a new trial, in which he did not argue that the closing argument of the State was prejudicial or improper. It is a well-established rule that where a written motion for a new trial was presented, all errors not presented in that motion are deemed waived on appeal. (People v. Irwin, 32 Ill.2d 441, 207 N.E.2d 76; People v. Dixon, 10 Ill.App.3d 1038, 295 N.E.2d 556.) The failure to include in his written motion the contention that the State's closing argument was prejudicial constitutes a waiver thereof, and the defendant is now prohibited from raising that issue on review.

Even if we were to consider defendant's argument on its merits, the remarks by the prosecutor in his closing argument do not constitute reversible error. The defendant argues that the prosecutor's closing argument was designed to arouse fear and passion in the minds of the jury, that the prosecutor improperly commented on the defendant's failure to testify and that the prosecutor incorrectly stated the law applicable to the case. It is a well-established rule that improper remarks by a prosecutor do not constitute reversible error unless they result in a substantial prejudice to the defendant. (People v. DeSavieu, 11 Ill.App.3d 529, 297 N.E.2d 336; People v. Nilsson, 44 Ill.2d 244, 255 N.E.2d 432.) The determining factor as to whether a prosecutor's closing argument constitutes reversible error is whether there was a reasonable possibility that the argument contributed to defendant's conviction. (People v. Bracy, 14 Ill.App.3d 495, 302 N.E.2d 747.) In this case, the prosecutor's closing argument was not improper.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.





58897

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.	)	
	)	HONORABLE
PETER JOHNSON,	)	KENNETH R. WENDT,
Defendant-Appellant.	)	JUDGE PRESIDING.

PER CURIAM:

Peter Johnson, defendant, was found guilty after a bench trial of the offense of theft in violation of section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 16-1(a)(1)). He was sentenced to a term of one to three years.

Defendant's only argument on appeal is that he did not knowingly and understandingly waive his right to a trial by jury. Since defendant does not question the sufficiency of the evidence against him, a recitation of the facts is unnecessary. The record discloses the following colloquy concerning a jury trial:

"THE COURT: In the State of Illinois you have a right to a jury trial, to see if they would render a verdict of guilty or not guilty.

"THE DEFENDANT: Yes, sir.

"THE COURT: You so indicated by signing what we call a jury waiver, is that right?

"THE DEFENDANT: Yes, sir.

"THE COURT: Mr. Scheffler (Assistant Public Defender), I assume the plea is not guilty?

"MR. SCHEFFLER: That is correct, your Honor.

"THE COURT: All right, does the State wish to say anything in the nature of an opening statement?"

There is no specific formula for determining whether a defendant's waiver of the right to a jury trial is knowingly and





understandingly made. Each case depends upon the particular facts and circumstances of that case. (People v. Richardson, 32 Ill. 2d 497, 207 N.E.2d 453; People v. Diesel, 128 Ill. App. 2d 388, 262 N.E.2d 15.) A lengthy explanation of the consequences of a jury waiver is not a prerequisite to the validity of the jury waiver. People v. Geary, 8 Ill. App. 3d 633, 291 N.E.2d 13.

In the case at bar, defendant was represented by an assistant public defender. The trial judge specifically informed defendant of his right to a jury trial and then asked defendant if he had indicated his intentions by signing a jury waiver. Defendant replied in the affirmative. Defendant voluntarily signed a jury waiver which is part of the record on appeal. There is nothing in the record to indicate that defendant's jury waiver was not knowingly and intelligently answered.

(See People v. Sailor (1969), 43 Ill. 2d 256, 253 N.E.2d 397.) The record also indicates that defendant was no newcomer to criminal proceedings, which is a factor of importance in determining whether a jury waiver is understandingly entered. (People v. Gay, 4 Ill. App. 3d 652, 281 N.E.2d 738.) Under these circumstances, we conclude that defendant knowingly and understandingly waived his right to a trial by jury. People v. Sanders, 14 Ill. App. 3d 826, 303 N.E.2d 552.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

SECOND DIVISION

LEIGHTON, J., did not participate.

(Publish abstract only.)





59200

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.	)	
	)	HONORABLE
ALEXANDER BLAND,	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	JUDGE PRESIDING.

Mr. JUSTICE DOWNING delivered the opinion of the court:

Alexander Bland (hereinafter defendant) was indicted for the offenses of murder and armed robbery. After a bench trial, he was found guilty of both offenses and sentenced to a term of 20 to 50 years.

The sole issue raised on appeal is whether an accomplice's testimony was sufficiently credible to establish defendant's guilt beyond a reasonable doubt.

The testimony adduced in the court below, insofar as it is pertinent to this appeal, can be summarized as follows. Dreamle Scott, who was 17 years of age at the time of defendant's trial, testified on direct examination that on September 17, 1972, at approximately 12 o'clock in the afternoon, she met defendant in front of her house on East 41st Street in Chicago; and that she and defendant walked to the corner of 43rd and Cottage Grove, along the way discussing the possibility of robbing a cab. Thereafter, a Yellow Cab Company cab, driven by Eddie Moore, the victim, was hailed, and defendant directed Moore to drive to 71st and Ashland. The witness stated that she was seated in the rear seat, behind the driver, and that defendant was seated to her right. Upon reaching 71st and Ashland, defendant directed Moore to proceed to 75th and Paulina, which Moore did. Thereupon, defendant ordered the witness to get into the front seat of the cab, which she did,



and defendant then ordered Moore to pull the cab around the corner, which he did. When the cab stopped, Ms. Scott got out, and defendant ordered Moore from the cab, pointing a handgun at Moore. The witness further testified that she came around the rear of the cab and approached Moore, as defendant stood within three or four feet of Moore in the street, holding a gun on him; that defendant, as they were so standing, then took some money from Moore's coat pocket; that as she approached Moore, he grabbed her and tried to push her into defendant, and that they both fell to the ground; that after both she and Moore had gotten up, Moore started to come up behind her and that she ran from the scene; that, while running, she looked back, but didn't see the cab driver; that as she ran, she heard three shots fired; that defendant then joined her, they ran together, caught a bus to return home, and defendant gave her approximately \$13 of the money he had taken from Moore.

Under cross-examination, Ms. Scott admitted she had never been indicted or arrested as a result of the Moore murder. Further, Ms. Scott was impeached by virtue of conflicts between certain aspects of her direct examination testimony and prior testimony she had given before the grand jury which indicted defendant. Ms. Scott had earlier told the grand jury that she had not agreed to rob the cab driver, that she had not known that defendant was armed, and that it was not until after she had entered Eddie Moore's cab that she understood that a robbery was about to be committed. Her direct examination testimony regarding the specific circumstances surrounding the robbery, the murder, and their aftermath remained unshaken under cross-examination, however. In addition, she was asked the following questions under cross-examination:





"Q. (by defense counsel) Did anyone ever say to you that if you did not come and testify that you would go to jail?

A. Yes.

\* \* \*

The Court: Who said that?

The Witness: A Officer, I don't know his name, Wiley."

Ms. Shirley Rushing, who lived near the scene of the incident, testified as a State's witness that at the time of the occurrence she heard about three shots fired; that she had seen the man who had shot Moore; and that she had observed a lady and a man, other than the murderer, running from the scene of the shooting.

It was stipulated at trial that were medical experts called to testify, it would be their testimony that the body of the deceased had three bullet wounds, and in their medical opinion, Eddie Moore died of bullet wounds of the abdomen, liver, and mesentery.

Defendant did not testify.

Defendant argues on appeal that Dreamle Scott's testimony at trial was contradictory, uncorroborated, and insufficiently credible to establish defendant's guilt beyond a reasonable doubt. He contends that her testimony before the grand jury concerning the degree of her involvement differed from her trial testimony, and that while this contradiction admittedly does not establish defendant's innocence, it casts doubt upon her credibility and suggests that she may have tailored her entire trial testimony in order to become an effective State's witness to "save her own neck," to use defendant's phrase.

Defendant further urges that the State's attempt to corroborate Ms. Scott's version of the events by way of Ms. Rushing's testimony failed, in that Ms. Rushing in fact contradicted Ms. Scott at several junctures: (1) there were





two men at the scene, other than Eddie Moore, and not only defendant, as Ms. Scott had testified; (2) the man who ran with the lady from the scene was not the same man who had done the shooting; and (3) Ms. Rushing never identified defendant as having been at the scene.

This court in People v. Mostafa (1st Dist. 1971), 5 Ill. App. 3d 158, 274 N.E.2d 846, had occasion to review some of the principles established regarding the competency of accomplice testimony, and we stated the following at page 175 of Mostafa:

"Testimony of accomplice witnesses is competent, and if, considering all the facts and circumstances in evidence, the testimony proves guilt beyond a reasonable doubt, it will authorize a verdict of guilty, whether corroborated or not. (People v. Nastasio, 30 Ill.2d 51, 195 N.E.2d 144; People v. Kendall, 357 Ill. 448, 453-54, 192 N.E. 378; People v. Dell, 77 Ill.App.2d 318, 222 N.E.2d 357.) This rule has the corollary that a conviction resting solely on testimony of accomplices will not be disturbed on appeal where the facts and circumstances testified to by accomplices, scrutinized by rules governing appraisal of testimonial evidence, are sufficient to prove guilt beyond a reasonable doubt. People v. Karatz, 365 Ill. 255, 5 N.E.2d 842."

Moreover, it has been held many times that accomplice testimony is not of the most satisfactory character and is attended with serious infirmities which require utmost caution in relying upon such evidence alone. (People v. Nitti (1956), 8 Ill. 2d 136, 138, 133 N.E.2d 12; People v. Hermens (1955), 5 Ill. 2d 277, 285, 125 N.E.2d 500.) These considerations raise questions for the triers of fact:

"Such considerations go to the questions of the weight of the evidence or credibility of the witnesses, which questions are peculiarly the province of the jury or the court in the first instance. The jury, or the court in its stead, has opportunities not possessed by a court of review, to form a correct estimate of the credibility of witnesses and the weight of their testimony. For these reasons if the jury or the court is satisfied by the testimony of an accomplice, beyond a reasonable doubt, the judgment should not be set aside unless it is plainly apparent to the reviewing court that the defendant was not proved guilty beyond a reasonable doubt. People v. Jurek, 357 Ill. 626; People v. Rudnicki, 394 Ill. 351." (People v. Nitti, supra, at pages 138-139.)



We have thoroughly reviewed the record presented, as it is our duty to do when questions such as those raised here are attendant to an appeal. (People v. Mostafa, supra, at page 168.) We find that this is certainly not a case where it is plainly apparent to us that the defendant was not proved guilty beyond a reasonable doubt. Suffice it to say that the trial court, the trier of fact in this instance, was convinced that defendant was guilty beyond a reasonable doubt, based upon the testimony of an accomplice, and we will not substitute our judgment for his unless it plainly appears that such a degree of proof was lacking; it does not plainly appear that said degree of proof was lacking in the case at bar.

For these reasons, we accordingly affirm the judgment of the circuit court of Cook County.

Judgment affirmed.

STAMOS, J., and LEIGHTON, J., concur.

(Publish abstract only.)

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59179

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.	)	
	)	
EBB SPRIGGS, JR.,	)	HONORABLE FRED G. SURIA, JR.,
	)	Presiding.
Defendant-Appellant.)	)	

PER CURIAM:

Ebb Spriggs, Jr., defendant, was found guilty after a bench trial of the crime of rape in violation of Section 11-1(a) of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 11-1(a)). He was sentenced to a term of four years to four years and one day to be served consecutively to a previously imposed sentence of 15 to 25 years on the charge of murder. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt and that his sentence is excessive.

At trial, the following evidence was adduced: Jeannie Wright testified that on September 12, 1970, at 6:30 A.M., she was walking in the area of Kilpatrick and Madison Streets, Chicago, Illinois, on her way to work. It was light outside at this time. She heard footsteps behind her and the defendant grabbed her, produced a knife, and said, "Bitch if you scream I'll kill you." Defendant held a knife which he put to her throat and forced her into an alley where he took her purse and dumped its contents into a garbage pail. Finding no money, defendant told her that since she did not have any money, he was going to force her to have sexual intercourse. Defendant put his arm around her shoulder, put the knife to her side, and walked her about a block and a half to an apartment building. There, defendant took her to a platform area slightly down from the ground level and illuminated by sunlight. Defendant ordered her to take off her undergarments and she complied. Defendant removed his jacket,





placed it on the floor, and told her to lie on it. At this time, she noticed that defendant was wearing a red silk T-shirt. Defendant then forced her to have intercourse with him. Defendant left, telling her to stay there until he was out of sight. The defendant was in her presence for about 25 to 30 minutes during which time she was able to observe his face. After defendant left, she ran home and told her brother what had occurred. She then called the police who took her to Cook County Hospital where she was examined by Dr. Wasid.

Jeannie Wright testified that several days later she was working in her uncle's restaurant at Cicero and Madison Streets, Chicago, Illinois, when she observed the defendant seated in the restaurant. She immediately informed her uncle that the defendant was the man who had attacked her. The police were called and Miss Wright's uncle and several patrons restrained defendant until the police arrived.

Vito Markas, a Chicago Police officer, testified that at 7:30 A.M. on September 12, 1970, he and his partner responded to a call and proceeded to 4656 W. Adams, Chicago, Illinois. There they met Jeannie Wright, who stated that she had been raped. Miss Wright described her attacker as a male Negro, 20 years old, five feet, 11 inches tall, thin build, Afro hairstyle, mustache, unshaven, red undershirt, and light colored trousers. Miss Wright was transported to Cook County Hospital where she was examined by Dr. Wasid.

David Orazetz, a Chicago Police investigator, testified that on September 16, 1970, at 1:40 P.M., he and his partner responded to a call and proceeded to the restaurant at 4750 Madison, Chicago, Illinois. There, Jeannie Wright identified the defendant as the man who had attacked her several days earlier. Defendant was placed under arrest. At that time, defendant was wearing a red silk T-shirt underneath his regular shirt.

Charles Wos, a Chicago Police investigator, testified that on September 16, 1970, he observed the defendant at the 15th District Police Station. At that time, defendant was wearing a red T-shirt



underneath his regular shirt.

It was stipulated that if Dr. Wasid were called to testify, he would state that on September 12, 1970, he was the doctor who examined Jeannie Wright at Cook County Hospital. His examination revealed the presence of spermatozoa in the vaginal smear taken from Miss Wright.

Defendant's first contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Defendant argues that his identification by Jeannie Wright was not certain enough to prove his guilt beyond a reasonable doubt. It is a well established rule that, in a rape case, the testimony of the prosecutrix alone, if clear and convincing, is sufficient to sustain a conviction. People v. Wright, 3 Ill.App.3d 829, 279 N.E.2d 398. Here, Jeannie Wright testified that during the daylight hours, she was attacked by the defendant who put a knife to her throat and forcibly raped her. The entire incident took 25 to 30 minutes, during which Miss Wright was able to get a clear look at defendant's face. She gave the police a detailed description of her attacker, including the fact that he was wearing a red silk T-shirt. A medical examination of Miss Wright revealed the presence of sperm in the vaginal area. Several days after the incident, Miss Wright was in a restaurant when she observed the defendant and immediately recognized him as the man who had attacked her. The police were summoned and defendant was placed under arrest. When arrested, the defendant was wearing a red silk T-shirt under his regular shirt. After seeing and hearing all of the evidence, the trial judge found that defendant's guilt had been established beyond a reasonable doubt. After a complete review of the entire record, we cannot say that the evidence is so unsatisfactory, improbable or unreasonable as to leave a reasonable doubt as to defendant's guilt. People v. Smith, 9 Ill.App.3d 195, 292 N.E.2d 128.

Defendant's second contention on appeal is that the imposition



of a sentence of four years to four years and one day, to be served consecutively to a previously imposed sentence of 15 to 25 years for murder, is excessive and should be changed to a concurrent sentence. While this court has the authority under Supreme Court Rule 615(b)(4) (Ill. Rev. Stat. 1971, ch. 110A, par. 615(b)(4)) to reduce the sentence, the Supreme Court has indicated that this authority should be exercised with considerable caution and circumspection, for the trial judge has a superior opportunity to make a sound determination concerning the penalties to be imposed than do appellate tribunals. People v. Hopkins, 53 Ill.2d 452, 292 N.E.2d 418; People v. Fox, 48 Ill.2d 239, 269 N.E.2d 720. In the case at bar, the hearing in aggravation and mitigation revealed that the defendant had three prior misdemeanor convictions, the last two of which were reduced from burglary charges, and was presently serving sentences for murder, attempt murder, aggravated battery, and armed robbery. Defendant's argument that he was offered a lesser sentence by the State if he entered a plea of guilty does not necessitate a reduction in his sentence. People v. Busch, 15 Ill.App.3d 905, 305 N.E.2d 372. After a careful review of the entire record, we find that, considering the facts as adduced at trial and defendant's criminal background, the trial court did not abuse its discretion in imposing a consecutive sentence.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

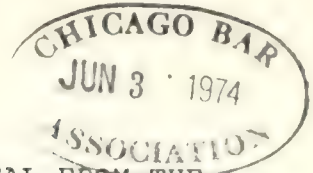
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FIRST DISTRICT-SECOND DIVISION  
 DOWNING, J., did not participate.

PUBLISH ABSTRACT ONLY.

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No. 56651

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
	)	
v.	)	
	)	
JUAN MARTINEZ,	)	HONORABLE
	)	ALFONSE F. WELLS
Defendant-Appellant.)	)	PRESIDING

PER CURIAM:\* (First District, Fifth Division)

Defendant was indicted on charges of unlawful sale and possession of a narcotic drug in violation of section 22-3 of the Illinois Criminal Code (Ill. Rev. Stat., ch. 38, par. 22-3). He was found guilty after a bench trial on the charge of unlawful sale and sentenced to a term of ten to twenty years. The charge of unlawful possession was dismissed. On appeal, the defendant contends that he was not proven guilty beyond a reasonable doubt; that an invalid warrant was issued for his arrest; and that an excessive sentence was imposed.

At a hearing on a pretrial motion to quash the arrest warrant, defendant testified that no arrest warrant was shown to him at the time of his arrest. Chicago Police Officer Terrence Markham testified that defendant was arrested pursuant to an arrest warrant which had been sworn out by Markham's partner, Chicago Police Officer John Rouzan. Rouzan did not have personal knowledge of the facts supporting the warrant but received the information from Markham. Defendant argued that the warrant was invalid since it was supported solely by hearsay, but the motion to quash the warrant was denied, and on appeal defendant does not raise the question of invalidity because of the alleged hearsay.

Markham testified at trial that at about 6:15 P.M. on December 5, 1970, he was dressed in levi pants and a black leather jacket and was with William Magafus, a special police employee, in the vicinity of Western and Potomac Avenues when

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\* Mr. Justice Barrett did not participate.





Magafus introduced him to defendant, who asked Markham how many bags of heroin he wished to "cop" (meaning to purchase). He said he wanted two bags, and when defendant replied that it would cost \$11.00, he handed him the money and defendant then spit two rubber balloons out of his mouth and gave them to him. Markham then explained that some narcotics peddlers place heroin in plastic containers which are inserted into small, penny balloons. The ends of the balloons are then tied to form a package about the size of a gumball, and they are then carried in the mouth of the peddlers. After the purchase, he drove away and joined Rouzan, who had been stationed two blocks away. Rouzan then made a field test of the contents of one of the packets, which showed a positive reaction to heroin.

Rouzan testified that he had opened one of the packets given to him by Markham for the purpose of a field test and that the packets were dry (meaning not wet) at that time. He then related the steps taken by him and Markham in inventorying the evidence at police headquarters.

Police chemist Charles Vondrak testified that the evidence in question consisted of .20 grams of heroin. He related the various tests he performed on the contents of the packets.

Defendant testified in his own behalf that he was at Western and Potomac Avenues at 10:30 P.M. on December 5, 1970, but that he did not know whether he was there at 6:00 P.M. The witness stated that he saw neither Magafus nor the other officers at that time and that he did not sell a white substance to Markham. The first time the defendant saw Markham was on January 29, 1971, the date of the arrest.

#### OPINION

##### I.

In support of his contention that he was not proven guilty beyond a reasonable doubt, defendant points out alleged conflicts in the testimony of the officers; namely, that Markham



testified that the heroin he allegedly received was in two packets, packed in two balloons, and that he opened one of the two balloons in the presence of Rouzan, but Rouzan testified that Markham gave him two packets (not balloons) and he (Rouzan) opened one of the packets; that after the field test, no effort was made to recover the \$11.00 allegedly paid to defendant or even to arrest him until two months later; that Magafus was not strip-searched before the sale; that Rouzan was not aware of what Markham did at the scene of the sale. From these and other arguments, defendant claims that the evidence was insufficient to support his conviction.

We note that defendant does not challenge the sufficiency of the evidence with respect to the sale of the packets nor the evidence relating to the nature of their contents. Neither does he challenge Markham's testimony that defendant was the seller of those packets. Where an undercover police officer completes the sale of heroin the testimony of the testifying officer, if believed, is sufficient to find defendant guilty beyond a reasonable doubt. People v. Adams, 46 Ill.2d 200, 263 N.E.2d 490. We think that the questions raised by the above set forth arguments of defendant relate solely to the credibility of the witnesses and are matters for resolution by the trier of fact, whose findings will be disturbed only where the evidence is so unsatisfactory as to leave a reasonable doubt of defendant's guilt. People v. Scott, 38 Ill.2d 302, 132 N.E.2d 441. We are of the opinion that the evidence is not so unsatisfactory as to require a reversal.

## II.

Defendant further contends that the warrant issued for his arrest was invalid, because it named him as "Juan Martinez" rather than as "Juan Montanez", and further that it failed to describe him. We note that several motions were filed on behalf of defendant by his privately retained counsel, both before and after trial. However, this question was not raised in those



motions or otherwise in the trial court. Those motions, which included a motion to quash the arrest warrant, were titled in the name of "Juan Martinez", the same name that appeared in the indictment, and no showing has been made that the name difference resulted in any substantial prejudice to defendant. This defect in the arrest warrant was a mere technicality and as such will not be considered as grounds for reversal here. (Ill. Rev. Stat. 1971, ch. 38, par. 107-10). Furthermore, the names "Martinez" and "Montanez" are sufficiently similar to permit the use of the rule of idem sonans, applicable to names which, when pronounced, result in practically identical sounds. Under this rule, the variance between the names is not fatal, and under the circumstances of this case, we hold that the names designate the same person. See People v. Lomax, 126 Ill.App.2d 156, 262 N.E.2d 63.

### III.

The final contention raised by defendant relates to the alleged excessiveness of the sentence of 10 to 20 years which was imposed upon him. He argues that in light of the failure of the record to disclose the amount of heroin sold to the officer and the fact that a lesser sentence would be conducive to rehabilitation, his sentence should be reduced to the minimum term of three years prescribed by statute for a Class 2 felony. The packets sold to Markham weighed .20 grams. The offense in question would, therefore, be governed by Class 2 felony provisions of the Unified Code of Corrections, since the transaction did not exceed .20 grams. (Ill. Rev. Stat. 1972 Supp., ch. 56-1/2, par. 1401(b)); People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269. However, the maximum term prescribed by the Unified Code for such an offense is any term in excess of one year not exceeding twenty years, and the minimum term is one year unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term which shall not be greater than one-third the maximum term imposed.





(Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(b), (c)).

At the time of the offense here, defendant was on probation from a conviction of the unlawful possession of narcotics. He was unemployed, and he informed the trial judge that he had been supporting a \$10.00-a-day narcotics habit by "getting money around" and from his parents. The evidence was sufficient to support the court's findings that probation had not been successful and that society would better be served by defendant's incarceration. The power of the reviewing court to reduce sentences under Supreme Court Rule 615(b)(4) should be exercised with considerable caution, since the trial court usually has superior opportunity to make a sound determination in that regard; People v. Caldwell (1969) 39 Ill.2d 346, 236 N.E.2d 706).

Although not raised by defendant, but conceded by the State in its brief here, the minimum term imposed should be six years and eight months to conform to the one-to-three ratio prescribed by the Unified Code for a Class 2 felony. (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1). This sentence is within the statutory limits and in accordance with the requirements of the Unified Code of Corrections and, under the circumstances here, we do not believe we should further reduce the sentence.

Accordingly, the minimum sentence is reduced to a term of six years and eight months, and the judgment, as modified, is affirmed.

Affirmed as modified.

(Publish abstract only)





57047

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
EARL HAWKINS and	)	
KENNETH BIRDSONG,	)	HON. KENNETH E. WILSON,
	)	Presiding.
Defendants-Appellants.	)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Earl Hawkins and Kenneth Birdsong were jointly indicted for murder (Ill. Rev. Stat. 1969, ch. 38, par. 9-1) and aggravated battery (Ill. Rev. Stat. 1969, ch. 38, par. 12-4.) They were tried together but Birdsong waived the jury and his case was heard by the court alone. As regards Hawkins, the issues were submitted to a jury. After verdicts and findings of guilty of both offenses as to each defendant, Hawkins was sentenced to 14 to 15 years for murder and one to three years for aggravated battery. Birdsong was sentenced to 14 to 22 years for murder and one to three years for aggravated battery. In each case the sentences were concurrent.

Each of the defendants has appealed and each has filed a separate brief. Hawkins contends that prejudicial cross-examination denied him his rights to confrontation of the witnesses and fair trial; prejudicial testimony was received regarding his refusal to make a statement to the police; unfair argument by the prosecutor deprived him of a fair trial; the sentence imposed was excessive; his case was transferred from the juvenile division to the criminal division without inquiry into propriety of the transfer and the evidence was not sufficient to prove guilt beyond a reasonable doubt. Birdsong contends that prejudicial trial error resulted from use by the prosecutor in rebuttal of two unlisted witnesses who should



have been called for the case in chief and that the proof is insufficient to prove guilt beyond a reasonable doubt. The People have filed one brief responding to all of the above contentions. We will consider each of the points raised but not in the order stated.

It is most logical to commence with a summary of the pertinent evidence. On July 5, 1970, at about 10:30 or 11:00 p. m., a large fire occurred on the south side of Chicago in the 4100 block of South Berkeley. A crowd of people came to the vicinity to see the blaze. Among the spectators were a number of members of two rival street gangs. A group of them walked to the center of the street and confronted each other. One eyewitness saw both defendants in one of the groups. He saw a person identified only as "Jerome" give a pistol to Birdsong who in turn handed it to Hawkins. Both Hawkins and Birdsong fired the pistol "towards the crowd" which included the deceased and the wounded youth. The witness heard three shots. He also heard the deceased say that he was hit and saw him fall.

A second eyewitness testified that he saw Earl Hawkins fire a gun once, toward him, and then pass it to Birdsong who fired twice. This witness was standing next to the deceased. He heard three shots. A third eyewitness testified that he attended the fire with the two previous witnesses. He saw both of the defendants at the scene. He was looking at the fire, heard some shots, turned and saw the defendant Birdsong fire two shots. He heard the deceased yell that he was hit and saw him collapse. No question arises regarding the sufficiency of the identification of defendants by these three witnesses.

In addition, another young man, 13 years old, testified that he was present at the fire and was shot in the left side.





He did not see any person fire a gun. Before he was shot he saw defendant Hawkins at the scene.

At the time of the occurrence, Hawkins was approximately 14 years old and Birdsong about 17. Neither of the defendants testified in their own behalf but both depended upon alibi evidence.

As regards defendant Hawkins, his alibi was advanced by his father, his brother and his mother. The father testified that on the day in question the defendant came home at about 9:30 p. m. and went to bed at about that time or 10:00 p. m. The fire was very close to the Hawkins' home but the father testified that he heard no shots. At about 11:30 p. m. he awakened his son, the defendant Hawkins, to watch the fire from their back porch. After about 30 minutes, defendant went back to bed. He remained in bed until police came to arrest him at about 3:00 or 4:00 a. m. the next morning. This witness was first approached about testifying some two or three weeks, or perhaps two months, before trial.

Defendant's brother, Charles, 18 years old, testified that he went to bed at 9:00 p. m. When he awoke at 9:30 p. m. the defendant was home. Defendant ate some food and shortly thereafter they went out on the back porch and watched the fire together. The witness stated that after a few minutes he went back to bed but his aunt awakened him to watch the fire at about 9:30 p. m. He watched the fire for about five minutes, then went back to bed leaving his brother, the defendant, still watching.

Defendant's mother testified that her son arrived home between 9:00 and 9:30 p. m. That was before the fire started. After some conversation, the defendant went to bed at about 10:00 or 10:30 p. m. She testified that the defendant did not





get up at any time to watch the fire and that her husband never awakened him. He remained in bed until the police came to arrest him. She also testified that her son, Charles, went to bed after the defendant and that Charles got up by himself to watch the fire.

As regards defendant Birdsong, his alibi was supported primarily by his cousin and his older sister. His cousin testified that she and defendant Birdsong's sister were present at the scene of the fire, together with defendant and another person named Jessie Paul. This witness heard loud noises and was frightened. Defendant Birdsong was standing with her and her friends during all of this time and she grasped one of his hands in reaction to her fright. She did not see defendant Birdsong with a gun that night.

The defendant Birdsong's older sister testified that she and the other designated persons went to watch the fire shortly after 10:00 p. m. Defendant never left her presence at any time. She heard some noises like firecrackers or cherry bombs. The entire group then returned to the building where she lived. This was about 10:30 or 10:45 p. m. Defendant Birdsong returned to her apartment with her and they played records until about 2:00 or 2:15 a. m. They then went to bed. She did not see a gun in the hand of defendant Birdsong that evening. Jessie Paul testified that she was at the scene with the others and heard the shots. Defendant Birdsong never left her presence. She left the group and went to her own apartment about five or ten minutes after 11:00 p. m.

The People called two witnesses in rebuttal. Luberta Evans knew defendant Birdsong for 12 years. At about 2:00 a. m. on the morning after the fire, he knocked at her door and requested and received her permission to spend the night with her family



in her apartment. As he was preparing for bed, defendant said, "They are not going to take me alive." A friend of hers named Queenie Common was present in her apartment at the time.

Mrs. Common testified that she was visiting Mrs. Evans when defendant Birdsong requested permission to stay in the apartment. Shortly thereafter there was a knock on a door across the hall. She asked Mrs. Evans if that was her door. The response was, "That is across the hall." Defendant then said, in substance, that he would not be taken alive. This witness also testified she was present at the scene of the fire, heard gunshots and saw a wounded young man fall at her feet. She saw defendant Birdsong some 20 to 25 feet away carrying a gun.

This case presents a familiar pattern of testimony of a number of eyewitnesses contradicted by evidence of alibi. It also presents the usual argument regarding sufficiency of the evidence. Defendants individually urge that the proof is not sufficient to support the jury verdicts and the findings by the court beyond reasonable doubt. In our opinion, the evidence in behalf of the People clearly and convincingly sustains the verdicts and the findings beyond reasonable doubt. Both of the alibies are weak and insufficient. The Hawkins alibi presents basic inconsistencies within itself. The Birdsong alibi is effectively contradicted by credible and unimpeached witnesses. This record presents a graphic contrast between strong and credible testimony of unimpeached eyewitnesses and weak and inconsistent evidence of alibi. The very most that can be said in behalf of both defendants is that there are questions of credibility which were properly resolved by the jury and by the court. As regards the verdict of the jury, we cannot say that "\*\*\*the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt" nor can we say that the jury was obliged to believe the



alibi evidence tendered by defendant Hawkins. (People v. Clark, 52 Ill. 2d 374, 387, 288 N.E.2d 363.) Similarly, as regards the findings of guilt in the bench trial of defendant Birdsong, we conclude that the proof was sufficient beyond a reasonable doubt. In addition, the trial court was not obliged to believe the alibi evidence. See People v. Jackson, 54 Ill. 2d 143, 149, 295 N.E.2d 462; also People v. Mays, 48 Ill. 2d 164, 170, 269 N.E.2d 281.

In addition to his argument concerning sufficiency of the evidence as above considered, defendant Birdsong also raises an elaborately presented contention concerning alleged abuse of discretion by the trial court in allowing two unlisted witnesses called in rebuttal to give testimony which properly belonged in the State's case in chief. Careful analysis of the essential elements of this contention shows that it is lacking in validity. Defendant Birdsong timely moved for and obtained an order requiring the State to furnish a list of prosecution witnesses. (See Ill. Rev. Stat. 1971, ch. 38, par. 114-9(a).) The State did not list Luberta Evans and Queenie Common, the two rebuttal witnesses here involved. After both parties had completed their case in chief, the prosecution called Luberta Evans as a rebuttal witness. Counsel for defendant Birdsong objected to the calling of this witness in rebuttal on the specific ground that her name did not appear on the list of witnesses furnished by the State. After hearing statements by counsel out of the presence of the jury, the court initially sustained this objection. However, the prosecutor urged that the State was unaware of the substance of the testimony of this witness, although it was generally informed of her existence, but that the furnishing of the list of witnesses applied only to the State's case in chief. The careful trial judge checked the law in his chambers. Based upon the authority of People v. Caldwell, 62 Ill. App. 2d 279, 210 N.E. 2d 556, the court held that rebuttal witnesses need not be





listed. The court thereupon overruled defendant's objection but gave his counsel an opportunity to interview the witness before her testimony.

Luberta Evans then testified as to the visit of defendant Birdsong to her home as above stated. The prosecutor then commenced to question her concerning an incident which occurred one month later. Defendant Birdsong objected to this and the court sustained the objection. The State made an offer of proof to which the objection was sustained. The offer concerned an incident during which the mother of defendant Birdsong came to Mrs. Evans' apartment, searched the bedroom where this defendant had slept, discovered a revolver under the mattress, wrapped it in paper and removed it from the apartment.

Mrs. Common testified regarding the appearance of Birdsong at the Evans apartment as above set forth. The prosecutor then questioned her about the occurrence during the evening of July 5, 1970. She was present at the scene when she heard a shot and then two more shots and a young man fell bleeding at her feet. She saw defendant Birdsong with a gun going through a vacant lot in the area. No objection was made to this additional testimony.

The only question raised for our consideration in connection with the testimony of these two witnesses is the propriety of calling Luberta Evans for rebuttal although her name was not contained on the list of witnesses. The testimony of Luberta Evans was pure rebuttal of the alibi which Birdsong sought to establish. The alleged incident which occurred one month later appears in the record only as an offer of proof. As regards the second witness, Queenie Common, her testimony was partly rebuttal of the Birdsong alibi and corroboration of the testimony of Luberta Evans. The balance of her testimony concerning the identification of defendant Birdsong at the scene of the shooting is now attacked in this court for the first time on the theory



that it was not proper rebuttal and that the State should have called her as a witness in chief. In view of the fact that no timely objection was made to the testimony of Queenie Common at the trial level, the point has been waived and may not be raised on appeal. People v. Linus, 48 Ill. 2d 349, 355, 270 N.E.2d 12; also People v. Henderson, 2 Ill. App. 3d 401, 406, 276 N.E.2d 372.

However, even if the point had been raised at the proper time, it would not have assisted defendant. In a situation of this type, the great weight of authority holds that, "[w]here testimony which might properly have been introduced as proof in chief is offered in rebuttal, it is discretionary with the trial court whether such testimony shall be admitted or not." (People v. Bell, 328 Ill. 446, 451, 159 N.E. 807.) Bell has been cited frequently to this point. See for example People v. Vincson, 15 Ill. App. 3d 934, 939, 305 N.E.2d 671 where this court recently pointed out that the fact that testimony "might also have been offered in chief does not preclude its admission in rebuttal."

This principle is applicable in the case before us. A portion of the testimony of Mrs. Common was proper in rebuttal because it tended "to explain, repel, contradict or disprove the evidence given by the defendant." (See Bell, 328 Ill. at 451.) Furthermore, her testimony regarding events at the scene of the shooting might also be regarded as rebuttal since it contradicted the Birdsong alibi by placing him at the scene of the crime with a gun in his hand. In addition, in view of the testimony of three eyewitnesses in the prosecution's case in chief, this evidence by Mrs. Common was merely cumulative.

As regards the issue of permitting the testimony of witnesses in rebuttal who were not included in the list furnished by the State, the careful trial judge came to the correct conclusion when he held that rebuttal witnesses need not be listed



by the State. The applicable statute provides that the requirement for the furnishing of a list of witnesses by the State, "shall not apply to rebuttal witnesses." (Ill. Rev. Stat. 1971, ch. 38, par. 114-9(c).) This principle is also set forth in People v. Caldwell, 62 Ill. App. 2d 279, 285, 210 N.E.2d 556, used by the trial judge, which cites the pertinent statute and which holds that, "even though testimony would be proper as evidence in chief, its admissibility rests largely within the sound discretion of the trial court." As authority for this statement, the opinion cites People v. Crump, 5 Ill. 2d 251, 265, 266, 125 N.E.2d 615, cited and relied upon in the brief for defendant Birdsong. Additional cases which arrive at the same result are People v. Snell, 74 Ill. App. 2d 12, 21, 22, 219 N.E.2d 554 and People v. Howze, 7 Ill. App. 3d 60, 68, 286 N.E.2d 507. In this type of situation, the arguments raised by Birdsong concerning alleged misrepresentation by the State and issues regarding constitutional tests applicable to the statute requiring defendant to give notice of alibi witnesses have no materiality.

The next contention raised by defendant Hawkins deals primarily with the alibi testimony given in his behalf by his mother, Earline Hawkins. Prior to considering these contentions, it should be noted that defendant Hawkins had previously appeared in the juvenile division of the circuit court. At a hearing there held, four men testified in his behalf that he was present at the time and place of the shooting. Part of the time he was in a hallway with his girl friend. All four of these witnesses testified that he had no gun in his possession and that he left the area after the shooting. The prosecution and attorneys for defendant Hawkins both had copies of a transcript of this testimony in their possession although the record does not show when either of these documents was obtained. The prosecution had their copy in possession of an Assistant State's Attorney during the trial and a copy of the transcript was appended to a motion in arrest of judgment filed in behalf of defendant Hawkins.





Examination of this document shows that the testimony in the juvenile division is patently contrary to the testimony given at trial before the jury by the mother, father and brother of defendant Hawkins. All of them testified that he was at home during the entire time of the shooting. The use of such contradictory testimony in two courts should be legally and morally abhorrent to both of the courts as well as to all officers thereof.

The prosecution made several efforts to bring this fact out before the jury. At one point the prosecutor asked Earline Hawkins on cross-examination:

"Weren't you present on August 25, 1970, at a Juvenile Court hearing when your son presented four alibi witnesses saying he was somewhere else?"

Counsel for defendant then said to the judge, "\*\*\*I object to the form of that question." The court replied, "Sustained as to form." The question was never answered.

In another instance, the prosecutor stated a partial question only, "And those four men in fact stated that your son was elsewhere other than in --?" Defendant's counsel interrupted before the question was completed and said, "Excuse me, judge--." The trial court then immediately sustained the objection and then further stated to the jury: "The jury will disregard the entire question. Put it out of your minds."

Defendant Hawkins urges that these incidents gave rise to reversible error. This contention rests on the basis of authorities such as People v. Nuccio, 43 Ill. 2d 375, 253 N.E.2d 353. The reversal of the conviction in Nuccio rested upon repeated and unsupported insinuations of misconduct by the defendant coupled with the additional indispensable element of failure of the State to present appropriate rebuttal testimony. (See 43 Ill. 2d at 381.) However, Nuccio is not applicable in the case





at bar. Here, in proceedings outside the presence of the jury, the prosecution attempted to make an offer of proof of the transcript of the evidence before the juvenile division. Counsel for defendant Hawkins properly objected to this procedure and the trial court, with equal propriety, sustained the objection and rejected the offer. Thus, the situation presented is the converse of the situation which the Supreme Court dealt with in Nuccio.

In this regard, we need not consider the additional point raised by defendant Hawkins concerning applicability of the statute which provides that transcripts of testimony in juvenile proceedings shall not be admissible as evidence against a minor for any purpose in any other civil or criminal case. (See Ill. Rev. Stat. 1971, ch. 37, pars. 702-9 and 702-10.) In addition, it should be noted here that it is extremely problematical as to whether the jury was ever informed to any significant degree concerning the disparity between the testimony given in behalf of defendant before the jury and that in the juvenile division. There was an insinuation by the prosecutor regarding such disparity. But, objection by defendant was properly and promptly sustained and the jury was promptly and clearly instructed to disregard the matter. In addition, at the end of the proceedings, the jury was instructed that they should disregard questions to which objections were sustained. IPI-Criminal, No. 1.01.

However, we must consider another issue presented by defendant. During the cross-examination of Mrs. Hawkins, the State put a number of questions to her regarding whether she was present in the juvenile proceedings at the time the four alibi witnesses testified in behalf of her son. Objection to this matter by defendant Hawkins was overruled and the witness answered that she was not present at that time. In rebuttal the State then called a police officer who testified, after objection by defendant Hawkins had been overruled, that Mrs. Hawkins was, in fact, present



during this testimony. In surrebuttal the defendant Hawkins then recalled the witness and she testified that she was not present because the judge had directed her to leave and that she had done so.

Analysis of this situation shows that the initial questions put by the prosecution to Mrs. Hawkins on cross-examination should not have been asked. She was simply a witness whose cross-examination should have been limited to the scope of her testimony on direct. It is basically correct that the scope of cross-examination rests within the sound discretion of the trial court. (People ex rel. Walker v. Pate, 53 Ill. 2d 485, 502, 292 N.E.2d 387.) However, this principle should have application only to matters which have some connection with the alibi aspects of the testimony of the witness. In the case before us the issue as to whether or not the witness was present at the other proceedings had no bearing upon her testimony on direct examination, which was primarily directed to the alibi itself, or upon her credibility. This issue was entirely irrelevant and questioning upon it by way of cross-examination was contrary to the accepted principle that, "It is improper to ask a witness questions on irrelevant matters on cross-examination for the purpose of contradicting his answers." (See People v. Kirkwood, 17 Ill. 2d 23, 30, 160 N.E.2d 766 cited in People v. Sisti, 87 Ill. App. 2d 107, 112, 230 N.E.2d 500.) We, therefore, conclude that it was error to permit cross-examination of the witness and rebuttal testimony on this subject.

The next issue is whether the prosecutor's attempts to raise an inference regarding the testimony in the juvenile division and in raising the issue as to the presence of Mrs. Hawkins at the former hearing were so prejudicial to defendant Hawkins as to require reversal of the judgment or whether these errors can be classified as harmless. As the Supreme Court of Illinois "has repeatedly observed, the purpose of review in a criminal case is not to determine whether the record is perfect but rather to



determine whether the defendant has had a fair trial under the law and whether his conviction is based upon evidence establishing his guilt beyond all reasonable doubt." (People v. Ward, 32 Ill. 2d 253, 259, 204 N.E.2d 741.) Where evidence of guilt is so strong that this court can conclude that error appearing in the record was harmless beyond a reasonable doubt, then it is our duty to affirm the conviction. This principle has been followed by the United States Supreme Court and by the reviewing courts of Illinois on many occasions. In People v. Cole, 54 Ill. 2d 401, 406, 298 N.E.2d 705, various exhibits were improperly received in evidence; People v. Farnsley, 53 Ill. 2d 537, 546, 293 N.E.2d 600 deals with the propriety of three given instructions and People v. Telio, 1 Ill. App. 3d 526, 529, 530, 275 N.E.2d 222 deals with erroneous refusal to permit counsel for defendant to use a transcript of testimony before the grand jury for cross-examination. Even in cases involving serious constitutional questions, the reviewing courts of Illinois have never hesitated to invoke the doctrine of harmless error in an appropriate situation. People v. Brown, 51 Ill. 2d 271, 273, 281 N.E.2d 682 involves pre-trial confrontation and an in-court identification of defendant, and People v. King, 4 Ill. App. 3d 942, 944, 282 N.E.2d 252, involves violation of defendant's constitutional right against self-incrimination. See also People v. Johnson, 11 Ill. App. 3d 745, 749, 750, 297 N.E.2d 683.

This principle is decisive of the case before us. The prosecution presented the testimony of three eyewitnesses who testified directly to the presence of defendant Hawkins at the scene and to his use of a firearm. No question was raised as to the validity or strength of his identification by these persons. Cross-examination of these witnesses did not affect the strength and credibility of their testimony to the slightest degree. The only evidence offered by defendant Hawkins against this was testimony by three members of his family regarding an alibi. The testimony of these





witnesses was basically inconsistent. The father testified that the defendant Hawkins was home and that he had awakened his son to view the fire. The mother testified that the son was home but that he had never left his bed during the fire but had slept throughout the entire night until aroused by the police. The brother testified that defendant Hawkins had not yet been asleep at the time of the fire and that he and defendant went out to the back porch to watch the fire together. In weighing evidence of this type, it is difficult to conceive that any jury of 12 reasonable persons would believe this testimony regarding alibi as against the cogent evidence of the three eyewitnesses. We conclude beyond reasonable doubt that the error was harmless and did not contribute to the verdict of the jury.

Another point raised by defendant Hawkins pertains to the delinquency petition filed in the juvenile division. The State's Attorney requested transfer of the cause to the criminal division. A hearing was held and testimony was heard. The judge of the juvenile division then directed that the cause be transferred. In this court, defendant Hawkins contends that there should have been a complete hearing on the issue of propriety of the transfer. He cites and depends upon Kent v. United States, 383 U. S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045. This contention has been specifically rejected by the Supreme Court of Illinois. (People v. Reese, 54 Ill. 2d 51, 57, 294 N.E.2d 288 and other authorities therein cited including People v. Bombacino, 51 Ill. 2d 17, 280 N.E.2d 697, which gives full consideration to Kent.) This situation is fully explained by the Supreme Court in the recent case of People v. Sprinkle, 56 Ill. 2d 257, 307 N.E.2d 161.

Defendant Hawkins also claims prejudicial error by virtue of testimony before the jury that when he was arrested the officers informed him regarding his constitutional rights and he then refused to make any statement or to deny his guilt. It is



correct that this testimony was brought out before the jury. However, it was brought out completely by counsel for Hawkins over the objection of the State's Attorney. A number of Illinois cases strongly hold that a defendant cannot himself bring out evidence and then complain that this constituted reversible error. See People v. Bell, 53 Ill. 2d 122, 127, 290 N.E.2d 214; People v. Dowling, 51 Ill. 2d 370, 372, 373, 282 N.E.2d 696 and People v. George, 49 Ill. 2d 372, 379, 274 N.E. 2d 26.

Counsel for defendant Hawkins urge that he was unduly prejudiced by improper closing argument delivered by the prosecutor. The defense waived final argument so that the only closing statement submitted to the jury was that made by one of the prosecutors. The defendant points out some 12 instances of alleged prejudicial argument classified generally as confusion of facts and issues, misstatements of law and deprecation of defense counsel. We have carefully read and considered the entire final argument and all of the criticism leveled against it. In some nine or ten of these instances, the trial court promptly sustained the objection made by counsel for defendant. In the remaining situations, the objections were overruled. Usually, whenever an objection was sustained, the trial court carefully instructed the jury that they were to disregard the material to which the objection had been made and sustained.

In view of the tremendous diversity in closing arguments and in situations resulting therefrom, this court has held that it is "impractical to lay definite guidelines for what may and what may not be said in argument to a jury." (People v. Gilmore, 118 Ill. App. 2d 100, 110, 254 N.E.2d 590 quoting from People v. Wilson, 116 Ill. App. 2d 205, 253 N.E.2d 472.) The Supreme Court has frequently held that since the trial court has a superior opportunity to determine the propriety of final argument, questions



pertaining thereto are generally left within the discretion of the trial judge. (People v. Smothers, 55 Ill. 2d 172, 176, 302 N.E.2d 324.) In the case before us, we agree generally with the rulings of the trial court regarding the propriety of the objections. However, we must next determine, after consideration of all the circumstances including the arguments themselves and the rulings and admonitions of the trial court, whether these arguments were "a significant factor in the jury's determination" to warrant reversal. (People v. Moore, 55 Ill. 2d 570, 577, 304 N.E.2d 622; People v. Palmer, 47 Ill. 2d 289, 299, 300, 265 N.E.2d 627.) In this situation, the Supreme Court and this court have applied a number of tests. We must determine whether the making of the arguments in question and sustaining of objections thereto constituted "a material factor in the conviction" (People v. Clark, 52 Ill. 2d 374, 390, 288 N.E.2d 363) or resulted in "substantial prejudice to the accused." (People v. Nilsson, 44 Ill. 2d 244, 248, 255 N.E.2d 432.) In other words, we must decide if "the verdict would have been different had the improper closing argument not been made\*\*\*." People v. Trice, 127 Ill. App. 2d 310, 319, 262 N.E.2d 276.

Upon the entire record, considering the clear and convincing testimony of three eyewitnesses as compared with the nature of the alibi testimony, we cannot conclude that the final argument of the prosecutor, as criticized by defendant Hawkins, constituted reversible error. See People v. Mackey, 30 Ill. 2d 190, 193, 195 N.E.2d 636; People v. Porter, 11 Ill. 2d 285, 294, 143 N.E.2d 250.

Defendant Hawkins finally contends that his sentence of 14 to 15 years was excessive. His attorneys urge that the sentence lacks a spread between the minimum and the maximum. Counsel cite People v. Rockymore, 4 Ill. App. 3d 624, 281 N.E.2d 698 in which a sentence of eight to ten years for aggravated battery was



reduced by this court to a term of three to ten years. The principles applied in Rockymore are extraneous in the case before us since the sentence here was actually for the statutory minimum. Upon consideration of this entire record, we have concluded that the sentence is proper and not excessive. People v. Fox, 48 Ill. 2d 239, 251, 252, 269 N.E.2d 720.

We find no prejudicial error in this record which requires us to reverse the judgments appealed from.

Judgments affirmed.

EGAN, P.J., concurs in part; dissents in part.  
HALLETT, J., concurs.





Mr. PRESIDING JUSTICE EGAN concurring in part and dissenting in part:

While I concur in the majority opinion affirming the conviction of Birdsong, I must respectfully dissent from the opinion affirming the conviction of Hawkins.

The mother of the defendant Hawkins, Earline Hawkins, was cross-examined as follows:

- Prosecutor: Q. Weren't you present on August 25, 1970, at a Juvenile Court hearing when your son presented four alibi witnesses saying he was somewhere else?
- Defense Counsel: Wait, Judge, I object to the form of that question.
- The Court: Sustained as to form.
- Prosecutor: Q. Were you not present on August 25, 1970, at a Juvenile Court hearing?
- The Witness: A. Yes.
- Q. And at that hearing your son was present also, was he not?
- A. Yes.
- Q. And didn't in fact four witnesses, Robert -- Ronald Jennings, Lonnie Patterson, Cecil Cedrick and David Barnes, testify for your own son?
- A. Well, I wasn't in the presence of the statement they made.
- Defense Counsel: Judge, if the prosecutors who were in the courtroom, now he could talk to them. I object to this nature of that question the way it is presented.
- The Court: She may answer if they testified, and she may answer if she can as to whether or not they testified, if she was there.
- Prosecutor: Q. Weren't you there?



The Witness:

A. I was at the Juvenile, but I wasn't present in the courtroom when they went in because I was ordered to leave.

Q. Do you know if those four men testified?

A. I don't know what, whether they testified or not.

Q. Was Officer Kennedy, seated over here, there at the hearing?

A. Yes, he was.

Q. And weren't you in fact at that hearing when those four men testified?

A. I was not present when they testified.

Q. Was your son present when they testified?

A. Yes.

Q. And those four men in fact stated that your son was elsewhere other than --

Defense Counsel:

Excuse me, Judge, --

The Court:

Sustained. Sustained.

\* \* \*

The Prosecutor:

Q. Do you remember Mr. Robert Jennings being at those Juvenile Court hearings?

A. No, I don't.

Q. Do you remember four boys being at the Juvenile Court hearings and testified for your son?

A. I know they talked to some boys. I don't know what their name was.

Q. How about Lonnie Patterson, do you know him?

A. Yes.

Q. Was Lonnie there at the Juvenile Court proceedings?

A. Yes.

Q. Do you know Lonnie?

A. Yes, I know Lonnie.



\* \* \*

Prosecutor: Q. Now, Cecil was at the Juvenile Court hearing, too, wasn't he?

A. Cecil? Yes.

Q. He was there to testify for your son?

A. (Nodding).

Defense Counsel: Judge, --

The Witness: A. He was too.

Defense Counsel: -- Objection to the manner in which these questions are asked.

The Court: Sustained.

The Witness  
(continuing): I couldn't say if Lonnie is a Black Stone Ranger. He hangs around with the group that I know as the Black Stone Rangers. I don't know if Cecil Cedrick is a Black Stone Ranger, but he hangs around with them too. Cecil was at the Juvenile Court hearing.

Prosecutor: Q. How about David Barnes?

Defense Counsel: Judge, again I object. The prosecutor wants to call those witnesses he can pick them out.

Other Prosecutor: We intend to, Judge.

The Court: Well, sustained.

Defense Counsel: Objection to the thrust of the questions.

Prosecutor: Q. Do you know Mr. David Barnes?

Defense Counsel: I object to the question.

The Court: Sustained.

Prosecutor: Q. Did you ever talk to your son about what those four boys were going to testify to?

The Witness: A. No, I didn't.

\* \* \*

The cross-examination by the prosecutor was designed to show, and no doubt did show, the jury that four witnesses had





testified for the defendant in the Family Court differently than Mrs. Hawkins did at the trial. Such proof was manifestly improper. The State in this court seeks to justify the admission of such evidence on the much misunderstood theory that an accusation made in the presence of an accused is admissible against him unless he takes steps to deny it. In other words, Mrs. Hawkins was expected to "speak out" at the Family Court hearing and contradict the four witnesses. Although it should be readily recognized that chaotic conditions would be created in our courtrooms by such an extension of the general rule, let it suffice to say that precedent is expressly against the State's position. See People v. Nitti, 312 Ill. 73, 93, 143 N.E. 448.

The persistence of the prosecutor in attempting to bring this evidence before the jury in the face of repeated adverse rulings was prejudicial, and its impact was compounded when the State was permitted over objection to introduce the completely irrelevant rebuttal testimony of Officer Kennedy that Mrs. Hawkins was present in the Family Court when the four witnesses testified. I do not believe it any answer to the error, which the majority concedes, because there were differences between the testimony of the alibi witnesses. The jury had the right to believe Earline Hawkins and reject the testimony of all other witnesses, including the other alibi witnesses. The defendant "had the right to a trial by jury on competent evidence and to have [his] witnesses appear without an illegal disparagement of their credibility." People v. Galloway, 7 Ill. 2d 527, 534, 131 N.E.2d 474.

Added to this prejudicial conduct of the prosecution was the closing argument. The prosecutor referred to the members of the family who testified as "perjurers." And he said, "They lied." An objection to that argument was overruled. He said that the State's witnesses "were put under cross-examination by Mr. Gramenos, who is an experienced defense attorney. He can trip anybody up if he is of a mind to do so." An objection was



sustained. He also told the jury the defense attorney "went to great pains on cross-examination to bring out the fact that there might be gunpowder or lead fragments on the defendant." He characterized this as "confusing the officer." When an objection was sustained, he said: "When the fact remains that Counsel knows full well if you fire a gun you are not going to get powder burns on you."

An argument referring to defense witnesses as "liars" and "perjurers" has been condemned. (People v. Sicks, 299 Ill. 282, 132 N.E. 573; see also People v. Hoffman, 399 Ill. 57, 77 N.E.2d 195.) And so has the argument that suggests that defense counsel has resorted to trickery or attempts to confuse the issue where there is no basis for such argument in the record. People v. Stock, (Gen. No. 43484, Agenda 16, November, 1973), \_\_\_\_ Ill. 2d \_\_\_\_, \_\_\_\_ N.E.2d \_\_\_\_; People v. Berry, 18 Ill. 2d 453, 165 N.E.2d 257; People v. Freedman, 4 Ill. 2d 414, 123 N.E.2d 317; People v. Savage, 84 Ill. App. 2d 73, 228 N.E.2d 215.

While the remarks here, standing alone, might not be grounds for reversal, I believe they form part of the course of conduct by the prosecutors that deprived the defendant of a fair trial to which, guilty or innocent, he was entitled. People v. Galloway, 7 Ill. 2d 527, 536, 131 N.E.2d 474.

For these reasons I believe that the conviction of Hawkins should be reversed and the cause remanded for a new trial.





57808

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellant,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.	)	
	)	HONORABLE
ULYSSIS FLOYD (a/k/a ULYSSES FLOYD),	)	EARL E. STRAYHORN,
	)	PRESIDING.
Defendant-Appellee.	)	

PER CURIAM \* (First Division, First District):

The defendant, Ulyssis Floyd, also known as Ulysses Floyd, was charged with unlawful possession of a narcotic drug, heroin, in violation of Section 22-3 of the Criminal Code (Ill.Rev.Stat. 1969, ch. 38, par. 22-3). The trial court sustained the defendant's pre-trial motion to suppress the physical evidence, holding that there was not sufficient probable cause to stop the defendant on suspicion, that the items which were "the basis of this indictment were not discovered as the result of any search made by these officers but were observed in the course of their following through on their initial suspicion" and that, therefore, the physical evidence seized should be suppressed. The People appeal pursuant to Supreme Court Rule 604 (a)(1). Ill.Rev.Stat. 1971, ch. 110A, par. 604.

The sole issue on appeal is whether the trial court wrongfully sustained the motion of the defendant to suppress the physical evidence.

At the hearing on the defendant's motion to suppress, Police Officer Connie Hall testified that on February 4, 1971, at approximately 12:05 a.m., he was in an unmarked police car in plainclothes; that his partner, Police Officer Howard Patterson, was driving west-erly on 95th Street, Chicago, at about 10 or 15 miles an hour, when Hall saw the defendant sitting on the street side in the rear seat of a 1968 black 4-door Cadillac, drinking what appeared to be wine from a bottle, which was in a bag. Ronald Redden, who was driving his father's car, was sitting in the driver's seat and Robert Carey was in the back seat with the defendant.

\* Mr. Justice Burke did not participate.





On cross-examination, Hall testified he saw the defendant drinking with the bottle to his mouth; that Hall and Patterson got out of the police car and Hall asked Redden, "Don't you know it is against the law to be drinking in a car?" and Redden replied, "All we're doing is drinking a little wine." Hall then stepped to the rear of the Cadillac and as he was opening the rear door he observed the defendant drop a plastic bottle between his legs to the floor of the car. Hall picked up the plastic bottle and ordered the defendant and Carey out of the rear seat of the car. The bottle contained 19 little tinfoil packets containing narcotics. Hall further testified that the street lighting on 95th Street, which is a busy thoroughfare, was good.

Police Officer Howard Patterson testified that on February 4, 1971, he was driving a police vehicle on patrol with Police Officer Connie Hall; that about midnight they were patrolling on West 95th Street when he came alongside an automobile and he observed a man sitting in the back seat drinking out of a bottle. Patterson stopped the car. Patterson testified that Hall informed Redden that he was under arrest for having an open bottle of alcohol in his automobile and informed the defendant that he was under arrest for suspected possession of heroin.

On cross-examination, Patterson testified that he and Hall got out of the car and Hall said to Redden "Don't you know drinking in a car is illegal"; that Hall opened the back door of the car and the defendant dropped something which fell to the floor of the car.

The defendant testified that about twelve o'clock midnight on February 4, 1971, he was with Ronald Redden and Robert Carey in an automobile owned by Redden's father which was parked at the curb; that he had a wine bottle in his hand; and that he was sitting in the back seat by the curb and Carey was in the back seat, sitting on the street side. The defendant further testified that he observed the police vehicle as it passed their car; that the police car





continued through a stoplight which was at the corner, approximately ten feet away; that Police Officer Hall was driving and backed up to where the Cadillac was parked; that Hall asked Redden, "What's in the bottle?" and Redden replied, "Wine"; that the police officers then asked "If they knew it was against the law to drink it" and Redden said, "Yes, but we're just drinking a little wine." The defendant testified that the police officers ordered them from the car and searched them; and that Police Officer Patterson searched the rear seat of the car, came back with a little bottle, and said, "This is what we're looking for." The defendant also testified he had known both of the police officers before February 4, 1971; that previously they had stopped him for questioning.

On cross-examination, the defendant said that he, Redden and Carey were just sitting in the car drinking wine; that by the time the police officers arrived there was not very much wine left in the bottle; that both police officers got out of the car, but Police Officer Hall did not come over to the car, he just stood there looking over the top of the hood with his hand in his right coat pocket. The defendant said that when he got out of the car he had the wine bottle in his hand; that he turned it over to the police officer; and that the plastic bottle was not between his feet because he was outside of the car.

The defendant argues that the police officers did not have "reasonable suspicion" that the defendant was violating the law and, therefore, there was not sufficient probable cause for the police officers to stop and interrogate the defendant and the other occupants of the automobile; and that based on what the police officers had observed of the defendant's actions, their seizure of him was unreasonable and not in accordance with the Illinois "Stop and Frisk" statutes.

After the evidence was heard the court said:

"My conclusions of law would be that, based upon the information the officers had available to them at the time they drove past,



their stopping and returning to that vehicle, based upon what they observed, without further evidence, resulted in a stop of these occupants of this car on suspicion. I find that, as a matter of law, there was not sufficient probable cause." (Emphasis added.)

We judge that the officers stopping and returning to the vehicle did not constitute a "stop" or "arrest" or "seizure" within the meaning of Terry v. Ohio, 392 U.S. 1, or the Illinois Stop and Frisk Statutes (Ill.Rev.Stat. 1971, ch. 38, par. 107-14 and par. 108-1.01). (See People v. Priest, 9 Ill.App.3d 499, 292 N.E.2d 518; People v. Howlett, 1 Ill.App.3d 906, 274 N.E.2d 885.) After the police saw the defendant drinking wine from a bottle in the back seat of the automobile and the defendant admitted he was drinking wine, the officers had evidence of a violation of Section 11-502 of the Illinois Vehicle Code (Ill.Rev.Stat. 1971, ch. 95-1/2, par. 11-502), which provides as follows:

"No person shall transport, carry, possess or have any alcoholic liquor within the passenger area of any motor vehicle except in the original package and with the seal unbroken. A person convicted of violating this Section shall be fined not less than \$25 nor more than \$500."

At that point they were justified in arresting and searching the defendant. See People v. Priest, 9 Ill.App.3d 499, 502, 292 N.E.2d 518.

Another reason arises to justify the admissibility of the plastic bottle and its contents. The police officers saw the defendant drop the plastic bottle between his legs. The law is clear that there is no search involved when the seized article is in plain view. In People v. McCracken, 30 Ill.2d 425, 197 N.E.2d 35, the defendant contended that certain evidence seized from him at the time of his arrest should have been suppressed as being the result of an unlawful search. In rejecting this argument, the court said (30 Ill.2d, p. 429):

"We have held that a search implies a prying into hidden places for that which is not open to view; and that a search implies an invasion and quest with some sort of force, either actual or constructive (People v. Woods, 26 Ill.2d 557; People v. Marvin, 358 Ill. 426,



428). Where, as here, the articles are in plain and open view and are observed by police officers under suspicious circumstances, it is not a 'search' nor an unreasonable seizure for the officers to make a reasonable investigation hereof."

Other cases to the same effect are: People v. Johnson, 15 Ill.App.3d 741, 744, 305 N.E.2d 208; People v. Bombacino, 51 Ill. 2d 17, 280 N.E.2d 697 (cert. den. in 409 U.S. 912).

For these reasons we conclude that the trial court improperly suppressed the evidence.

The order of the trial court is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed in this opinion.

ORDER REVERSED,  
CAUSE REMANDED FOR TRIAL.







58348

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
	)	
	)	HONORABLE
WILLIE J. KELLEY,	)	DANIEL J. RYAN,
	)	PRESIDING.
Defendant-Appellant.	)	

PER CURIAM \* (First Division, First District):

Willie J. Kelley, defendant, was found guilty after a bench trial of the crimes of aggravated battery and armed robbery in violation of Sections 12-4 and 18-2 of the Criminal Code (Ill.Rev. Stat. 1971, ch. 38, pars. 12-4, 18-2). He was sentenced to a term of 5 to 10 years on the charge of aggravated battery and a term of 15 to 30 years on the charge of armed robbery, the sentences to run concurrently. Defendant appeals, arguing that his sentences are excessive and should be reduced.

At trial, the following evidence was adduced: Mercurio Odeo testified that on April 23, 1971, at 6:15 p.m., he left his place of employment and was walking to his car parked in the lot at 300 South Desplaines, Chicago, Illinois. After receiving his car keys from the attendant, he entered his automobile. Defendant entered the car from the passenger side of the vehicle, pushed Mr. Odeo down and took his wallet. Defendant then slashed Mr. Odeo's face apparently five times with a metal object. During the incident Mr. Odeo was able to get a clear look at the defendant's face; it was still light outside. Defendant then ran down Gladys Street. Mr. Odeo pursued defendant and hollered for help. Mr. Odeo testified that he received 150 stitches in his face to close the gashes.

Chicago Police Investigator Timothy Nolan testified that on April 23, 1971, at 6:15 p.m., he was walking westbound on Gladys Street, near Desplaines, when he heard Mr. Odeo hollering for help. He observed the defendant running down the street carrying a wallet

\* Mr. Justice Burke did not participate.



in his right hand. Mr. Odeo yelled that the defendant had just robbed him. Investigator Nolan chased the defendant and apprehended him a short distance away. When arrested, the defendant had a wallet in his hand which was subsequently identified by Mr. Odeo as belonging to him. Investigator Nolan testified that he returned to the area of Mr. Odeo's car and discovered a razor blade with brown stains on it near the car.

Defendant testified that on April 23, 1971, at 6:15 p.m., he was walking near the parking lot in question when he heard Mr. Odeo holler that someone had just robbed him. Defendant stated that he was nervous and started to run. Defendant denied ever robbing Mr. Odeo. Defendant also denied ever having possession of Mr. Odeo's wallet.

Defendant's first argument is that his sentence of 5 to 10 years for aggravated battery is excessive and in violation of the Unified Code of Corrections. Since defendant's case has not yet reached the stage of final adjudication, the Unified Code of Corrections is applicable. (People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) Under the Code aggravated battery is a Class 3 felony (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 12-4). The Code provides that for a Class 3 felony the maximum sentence shall be a term not exceeding ten years (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 1005-8-1(b)(4)), and that the minimum sentence shall be one year, unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term which shall not be greater than one-third of the maximum term set in that case by the court (Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-8-1(c)(4)). Here, the defendant's sentence of 5 to 10 years for aggravated battery is improper, in that the minimum exceeds one-third of the maximum. On the charge of aggravated battery, defendant's minimum sentence must, therefore, be reduced to a term of three years and four months.



Defendant's second argument is that his sentence of 15 to 30 years for armed robbery is excessive and should be reduced. The Supreme Court has stated that the power to reduce sentences should be exercised with considerable caution and circumspection. (People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673; People v. Caldwell, 39 Ill.2d 346, 236 N.E.2d 706.) The imposition of sentences is within the discretion of the trial court because the trial judge has a superior opportunity during the course of trial and during the hearing in aggravation and mitigation to determine the proper sentence. A court of review will not interfere with the trial court's discretion unless it is manifest in the record that the sentence is excessive and not justified. (People v. Keene, 1 Ill.App.3d 720, 274 N.E.2d 130.) In the case at bar, the evidence adduced at trial demonstrates that defendant committed a vicious armed robbery, during the course of which he repeatedly slashed the victim's face, which required 150 stitches to close the wounds. The hearing in aggravation and mitigation disclosed that defendant had previously been convicted of armed robbery and petty theft. After a complete review of the facts of the case and of defendant's prior record, we conclude that the sentence imposed on the armed robbery charge is within the statutory limits for the offense and is not excessive.

For the foregoing reasons, defendant's minimum sentence on the charge of aggravated battery is reduced to a term of three years and four months and, as modified, the judgments of the circuit court of Cook County are affirmed.

JUDGMENTS AFFIRMED, AS MODIFIED.







59154

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.	)	
	)	
JIMMY SPENCER, otherwise called	)	
JAMES FORD,	)	HON. FRANK J. WILSON,
	)	Presiding.
Defendant-Appellant.	)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Jimmy Spencer, otherwise known as James Ford, was indicted for armed robbery (Ill. Rev. Stat. 1971, ch. 38, par. 18-2.) After a bench trial, he was found guilty and sentenced to five to 15 years.

On his appeal, he contends:

1. The trial court erred in denying the public defender's request for a continuance;
2. The in-court identification of defendant did not have a sufficient independent basis;
3. It was error for the trial judge to deny defendant's request for a pre-trial hearing on a motion to suppress identification testimony;
4. He was denied a fair trial since the State misrepresented the facts in its opening argument and introduced evidence of other apparent wrongdoings involving him.

On October 25, 1971, at about 10:15 p. m., the complaining witness, Mr. John Hayes, accompanied by his girl friend, Miss Emma Richard, went to a cocktail lounge at 79th and Green Streets in Chicago. Mr. Hayes testified that he seated Miss Richard at the bar and, after ordering drinks, went out to his car, intending to leave the cash he had on his person in his automobile. He left the bar with a friend, Mr. Hall. They were approached from behind by two men, one of whom was armed with a handgun.





Mr. Hayes and Mr. Hall were ordered to the basement of a building at 7800 Green Street. After entering a washroom, each was told to face an opposite wall. Mr. Hayes had his identification, \$234 in cash, a diamond ring, a watch and a .22 caliber pistol taken from his person. After the robbery, the two assailants secured the door and fled, leaving the victims in the washroom.

Shortly thereafter, Mr. Hayes returned to the lounge and told Miss Richard he was held up by the first fellow that walked out behind him. Miss Richard testified that she saw defendant and another man leave the lounge immediately after Mr. Hayes. Mr. Hayes also saw the accused standing two to three feet from him in the lounge before he left for his automobile.

Prior to commencement of trial, the public defender requested a continuance since he had only a brief meeting with the defendant and had insufficient time to prepare a defense. A colloquy followed wherein the court instructed the defendant that he had a right to an immediate trial or a continuance, if that was his desire. Defendant's counsel advised him that an immediate trial was against his best interests; however, defendant indicated his desire to proceed at once.

"The granting of a continuance to permit preparation for trial or a substitution of attorneys rests within the sound discretion of the court and depends upon the facts and circumstances of each case." (People v. Gatherright, 9 Ill. App. 3d 1058, 1061, 293 N.E.2d 734 and People v. Solomon, 24 Ill. 2d 586, 589, 182 N.E.2d 736.) Under the circumstances of the present case, we do not believe that the trial court abused its discretion in denying the motion for a continuance. The trial judge informed the defendant of his rights and gave him the opportunity to decide whether he wished to proceed with trial. It was defendant's right to request an immediate trial and the trial judge did not abuse his discretion in respecting defendant's demand.



Defendant cites People v. Carr, 9 Ill. App. 3d 382, 292 N.E.2d 492. There, defense counsel stated that he needed more time for preparation and moved for a continuance. Notwithstanding his counsel's recommendation, defendant desired immediate trial. The continuance was granted over defendant's strong objection. On appeal, defendant contended he was denied his right to a speedy trial. The court held that if the trial "\*\*\*court had acceded to defendant's demands, and had defendant been found guilty, the question would surely have arisen as to whether defendant had been denied the effective assistance of counsel who had stated he was not prepared to defend." 9 Ill. App. 3d at 384.

We do not find that defendant was denied effective assistance of counsel. Defendant has not adequately shown prejudice resulting from the alleged lack of preparation. He has made no complaint that his counsel misunderstood his view of the facts, nor does the record suggest such a conclusion. The State's version of the crime was not complex. The State's witnesses were vigorously and thoroughly cross-examined. "Before it can be held that such a motion for continuation based on lack of time to prepare for trial has been improperly denied, it must appear that the refusal to grant additional time has in some manner embarrassed the accused in his defense and thereby prejudiced his rights." (People v. Ritcheson, 396 Ill. 146, 151, 71 N.E.2d 30. See also People v. Coleman, 45 Ill. 2d 466, 469, 259 N.E.2d 269 and People v. Weaver, 8 Ill. App. 3d 299, 304, 290 N.E.2d 691.) The defendant's rights were not prejudiced here. We find no abuse of discretion in this record. People v. Hayes, 52 Ill. 2d 170, 175, 287 N.E.2d 465.

Defendant next contends that his identification was not sufficiently independent of a suggestive photographic identification. Mr. Hayes based his positive in-court identification



upon his actual view of defendant prior to and at the scene of the robbery. He had an opportunity to view the defendant in the lounge and later on the street before he entered the basement at 7800 Green Street. Furthermore, from the time defendant first approached him, until the robbery was completed, four to five minutes had elapsed. During this time, defendant was in plain view. Although Hayes was held at gunpoint and forced to walk before the defendant, there is nothing in the record which suggests that defendant effectively concealed his identity. During the robbery the opportunity to observe was excellent, including the lighting and the length of time defendant was in close proximity to the complainant. Hayes testified he had occasion to see defendant in the basement and stated that defendant was "right up on me." See People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378.

Other evidence in this case strengthened the identification and left no reasonable doubt as to defendant's guilt. Mr. Hayes recalled seeing defendant shortly before leaving the lounge. When defendant approached him on the street, Hayes recognized him as being the first man who had followed him out of the lounge. Miss Richard testified that defendant and another man left the lounge "immediately after Mr. Hayes." Accordingly, we find that the in-court identification of the defendant was "based upon an independent origin unrelated to any allegedly suggestive photographic procedure." (People v. Hayes, 52 Ill. 2d 170, 174, 287 N.E.2d 465. See also People v. White, 116 Ill. App. 2d 180, 185, 253 N.E.2d 654.) Thus, the fact that the victim originally identified defendant from a photograph has no legal significance. See People v. Brown, 52 Ill. 2d 94, 99, 285 N.E.2d 1.

It is further contended that the trial judge erred in refusing to allow the defense a separate pre-trial hearing on a motion to suppress identification testimony. In support of this argument





the defense cites Ill. Rev. Stat. 1971, ch. 38, par. 114-12(c) and People v. Pugh, 133 Ill. App. 2d 168, 272 N.E.2d 742. Pugh holds that it was reversible error to compel the defense to proceed simultaneously with a motion to suppress and the trial. However, both this statute and the case deal with motions to suppress evidence illegally seized by an unlawful search and seizure. They have no specific application to the case at bar.

In People v. Nudo, 131 Ill. App. 2d 930, 268 N.E.2d 894, the defendant was charged with armed robbery and the complaining witnesses identified him after having viewed only one photograph at the police station. There, a pre-trial hearing on a motion to suppress identification testimony was denied. The court stated, "While it is undoubtedly a preferred procedure for a trial court to grant a preliminary hearing to determine the admissibility of in-court identification testimony, upon the facts of this case we cannot say that the trial court committed reversible error in refusing to exclude the testimonial identification, or in denying defendant's motion for a hearing upon such issue\*\*\*." (People v. Nudo, 131 Ill. App. 2d at 936.) The evidence there consisted of testimony of the witnesses that they had occasion to observe the defendant in good lighting so that there was clearly an independent basis for the identification quite apart from the photograph. As shown earlier in this opinion, Mr. Hayes had an independent basis for identifying the defendant. Therefore, if the failure to conduct the pre-trial hearing on the motion to suppress the identification testimony did constitute error, it was harmless because "it is apparent from the record that there clearly was an independent basis for the identification." People v. Bentley, 11 Ill. App. 3d 686, 689, 297 N.E.2d 282. See also People v. Barge, 7 Ill. App. 3d 721, 724, 725, 288 N.E.2d 492 and People v. Hopkins, 52 Ill. 2d 1, 5, 6, 284 N.E.2d 283.



Further, defendant claims that the photographic identification was not properly admitted into evidence since there existed an apparent contradiction by Hayes as to whether he was shown several photographs or made his identification based upon only one photograph of defendant. In People v. Camel, 10 Ill. App. 3d 968, 295 N.E.2d 266, the complaining witness was shown the defendant on a television screen. She viewed no other suspects. Later, she was shown two photos of defendant, a front and side view, and no photographs of other suspects. After both viewings she made a positive identification. There, defendant contended that the in-court identification was tainted by these suggestive procedures and should have been suppressed. On review the court held it was not error to admit the identification into evidence since it had an origin independent of the pre-trial confrontation. The record in the case before us shows beyond reasonable doubt that Hayes had an excellent opportunity to observe defendant before and during the robbery. It is apparent that his identification of defendant had an origin independent of the photographic identification and accordingly it was properly received into evidence. See People v. Connolly, 55 Ill. 2d 421, 303 N.E.2d 409.

Finally, defendant claims he did not receive a fair trial since the State misstated what the evidence would prove in its opening argument and introduced evidence of an unrelated crime during the trial. The State claimed that Hayes had known the defendant for five years when, in fact, it was Miss Richard who had known him. The State also claimed that part of Hayes' property was found on defendant's person at the time of his arrest. No testimony was introduced to substantiate this claim. The trial judge stated for the record that he would disregard the State's opening argument in making his finding. No statements or rulings in the record suggest that the trial judge did otherwise.



Defendant's final point, that evidence of an unrelated crime prejudiced defendant's right to a fair trial, is also not supported by the record. The officer who arrested defendant testified that he took defendant into custody while he was responding to a burglary call. Subsequent to this testimony, defendant moved for a mistrial. The motion was denied and the trial judge made it clear that the State did not suggest defendant was involved with this burglary. The court stated, "They haven't gone too far. I don't know what the burglary call is." The circumstances in each case must be looked to in determining the prejudicial effect of the challenged evidence and "the judgment will be reversed only where '\*\*\*the questionable language, considered in light of all the evidence of guilt, was a material factor in the conviction and that the verdict or finding would have been different\*\*\*'" had the testimony not been given. (People v. Norfleet, 15 Ill. App. 3d 567, 570, 304 N.E.2d 672, citing People v. Smith, 6 Ill. App. 3d 259, 263, 285 N.E.2d 460.) In light of the evidence presented and in view of the trial judge's remarks, we believe the verdict could not have been otherwise, even absent this testimony.

For these reasons, the judgment is affirmed.

Judgment affirmed.

BURKE and HALLETT, JJ., concur.





181A. <sup>3d</sup> 1011

59256



PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
	)	
MILTON GOLDEN, Impleaded,	)	HONORABLE
	)	ROBERT L. MASSEY,
	)	PRESIDING.
Defendant-Appellant.	)	

IN THE MATTER OF THE PETITION OF  
CHARLES W. NIXON FOR ATTORNEY'S FEES

Mr. PRESIDING JUSTICE EGAN delivered the opinion of the court:

This is an appeal by Charles W. Nixon, an attorney appointed by the court to represent the defendant, Milton Golden, from an order allowing attorney's fees of \$250.

Pursuant to a request dated March 20, 1972, by Judge Joseph A. Power, Presiding Judge of the Criminal Division, Charles W. Nixon, filed his appearance on April 10, 1972, on behalf of the indigent defendant, Milton Golden, who was charged with murder. The letter of appointment provided that Mr. Nixon as a member of the Defense of Prisoners Committee of the Chicago Bar Association agreed to compensation on the basis of \$10 per hour for out of court time and \$15 per hour for in court time, the fee not to exceed \$250.

Mr. Nixon is a partner in the firm of Brizius and Nixon, a two-man partnership. The overhead expenses of the firm for January and February, 1973, were \$3155.71 and \$3444.57 respectively. Nixon visited the defendant at Cook County Jail on March 24, 1972. On that date the court file was reviewed and the defendant's wife was interviewed. On March 29, 1972, Nixon read an abstract of the transcript of the coroner's inquest. He had conferences with his client, his client's family, witnesses for the State and defense; he prepared and presented pre-trial motions for severance and discharge under the 120-day rule with supporting memoranda; he examined an abstract of the coroner's transcript, the trial transcript





of a co-defendant, the preliminary hearing transcripts and the Family Court hearing transcript of a co-defendant. He visited the scene of the alleged murder and took photographs and represented Golden for 10 days in a jury trial. Before trial he appeared in court 11 different times. He spent 65.58 hours in out of court preparation and 71.75 hours in court. Golden and James Horton were tried together. Horton was found guilty of murder and Golden was found not guilty.

Chapter 38, Section 113-3(c) provides as follows:

"Upon the filing with the court of a verified statement of services rendered the court shall order the county treasurer of the county of trial to pay counsel other than the Public Defender a reasonable fee stated in the order not to exceed \$150 for each defendant represented in misdemeanor cases and \$250 in felony cases, in addition to expenses reasonably incurred as hereinafter in this Section provided, except that, in extraordinary circumstances, payment in excess of the limits herein stated may be made if the trial court certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount of the excess payment is approved by the Chief Judge of the Circuit. A trial court may entertain the filing of this verified statement before the termination of the cause, and may order the provisional payment of sums during the pendency of the cause.

Nixon filed a petition for attorney's fees requesting \$1732.05 contending that "extraordinary circumstances" existed and that the payment was necessary to provide fair compensation for "protracted representation" within the meaning of Section 113-3(c). The trial court denied the sum requested and fixed the figure at \$250 for representation and \$50 for expenses.

The language of the statute makes it clear that the determination of whether the attorney's services come within the exception must be made first by the trial judge and last by the Chief Judge of the Circuit. That determination necessarily involves the exercise of judicial discretion; and, as in all cases of judicial discretion, courts of review should not interfere unless there has been a clear abuse of it. That we might have entered a different order



is not enough. The statute has been construed in People v. Sims, 131 Ill.App.2d 327, 266 N.E.2d 536. That case sets out the circumstances leading to the adoption of the statute and its underlying rationale. It points up the analogous federal statutes and discusses cases decided thereunder. Among those cases cited is U.S. v. Kingston, (W.D.Pa. 1966), 256 F.Supp. 859, in which the District Court denied additional compensation where the attorney spent 46 hours in court and 136-1/2 hours in out of court preparation. Sims also lists the factors to be considered in determining whether "extraordinary circumstances" exist and whether the representation has been "protracted." It would serve no purpose to repeat here everything that was said in Sims, which we consider dispositive of the case before us. We are impelled to note, however, that Sims commended the lawyers of Illinois who "fulfill the highest tradition of their profession" by responding to the need for private counsel in criminal cases; we extend that commendation to Mr. Nixon, and, although the facts in this case are somewhat stronger than Sims, nonetheless we cannot say that the trial court abused its discretion in denying additional compensation.

The order of the circuit court is affirmed.

ORDER AFFIRMED.

BURKE, J. and GOLDBERG, J. concurring.

(PUBLISH ABSTRACT ONLY.)





58486

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
BOOKERT T. WALLS,	)	HONORABLE
	)	JOHN J. CROWLEY,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM\* (First District, Fifth Division):

Defendant, with co-defendants William Chambers, Michael Wilson and Philip Moody, were charged by complaint with battery and theft in violation of Sections 12-3 and 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, pars. 12-3, 16-1(a)(1).) After a bench trial, Moody was found not guilty. Defendant, Chambers and Wilson were each found guilty of theft. Defendant was placed on probation for a period of one year with the condition that he serve the first six months in the House of Correction. He alone appeals.

Defendant contends: (1) that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the identification testimony was not credible, (2) that the court's finding of not guilty as to Moody was irreconcilable with the finding of guilty as to himself so as to create a reasonable doubt of his guilt, and (3) that his sentence is in violation of the Unified Code of Corrections.

At trial the following evidence was adduced: Jeffery Green testified as a witness for the State that on August 17, 1972, at approximately 11:30 P.M., he and Howard Kaner were standing in the vicinity of Rush and Division Streets, Chicago, Illinois. They were approached by a male Negro, riding a bicycle, who engaged them in conversation. The man asked if they wanted to purchase

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\* Justice Barrett did not participate.





the bicycle, and Green agreed to purchase it. The man led them to his car and put the bicycle in the car, but the car would not start. They then took Kaner's car and followed the man riding the bicycle to the Cabrini-Green homes in order to get some rope. They wanted to put the bike in Kaner's trunk and needed the rope to tie it down. They arrived there at approximately 12:30 A.M. Immediately upon their arrival another man came up and took the bicycle around the block. The man who brought them there demanded money. Within three or four minutes between five and eight people came up to the car. One man got into the car and backed it to the parking lot at Cabrini-Green homes. Green was sitting in the car and tried to get the keys away from the man who was driving. Within a matter of minutes Green was thrown out of the car and the car was being stripped. \$48 was taken from him and he was kicked in the ribs. Green identified two of the co-defendants as being involved but did not identify defendant. The parking lot at Cabrini-Green homes was brightly lighted.

Howard Kaner testified as a witness for the State that on August 17, 1972, he was with Green in the vicinity of Rush and Division Streets, Chicago, Illinois. Defense counsel stipulated that Kaner's testimony would be substantially the same as Green's as to the preliminary matters prior to arriving at Cabrini-Green homes. Upon their arrival there a group of approximately ten men came up to the car. He identified defendant and Philip Moody as two of the men in the group. The men asked how much money they had in their possession. The men took the keys to the car and drove it back into the parking lot. While defendant and Moody held him, the others started going through the car. Defendant kept telling them to give the men everything they had. Taken were his ring, his watch, the car radio, his eyeglasses, his wallet, his money (\$30) and his identification. Kaner was



unable to state exactly what Moody did to him. Defendant struck him in the face several times and in the stomach. The men continued to beat Kaner and started to take him to an apartment. Kaner managed to break loose and ran to get the police. The first time he saw defendant was when defendant hit him in the face.

Angeline Davis testified as a witness for the defense that she was present when the two complaining witnesses first came into the Cabrini-Green area. At that time they were with a man named Egbert. She walked over to where they were standing and asked what was going on. Egbert replied that these dudes were trying to sell them marijuana. She heard Kaner tell Egbert that he could trade the bike in for some smoke. Egbert replied that he didn't know, and Green started pulling Egbert and tried to get the bike to go into the back seat of the car. About 10 or 15 boys then came to the scene. None of the defendants in the case at bar were among the group that came to the scene.

Mary Chambers, the wife of co-defendant Chambers, testified as a witness for the defense that she first noticed the occurrence involving the two complaining witnesses on her way downstairs from her home. Prior to that time she had been in her apartment playing cards with Wilson, defendant, Moody and her husband.

Michael Wilson testified in his own defense that on August 17, 1972, at 7:00 P.M., he was in the Chambers' apartment at 502 West Oak with William Chambers, Philip Moody, defendant, Mrs. Chambers and a Miss Chambers. He remained in the apartment until approximately midnight playing cards. He left to get beer and cigarettes with Chambers, Moody, defendant and Mrs. Chambers at approximately 12:00 or 12:30 A.M. As he was coming out of the building he was placed under arrest by Chicago police officers.

Defendant testified in his own defense that on August 17,



1972, he was in the Chambers' apartment at 502 West Oak with William Chambers, Philip Moody, Michael Wilson and Mrs. Chambers playing cards. He left with Wilson, Moody and Mrs. Chambers between 12:00 and 1:00 A.M. As they were coming downstairs, they were placed under arrest by Chicago police officers. The first time he saw Kaner was at the police station.

Philip Moody testified in his own behalf that on August 17, 1972, he was in the Chambers' apartment at 502 West Oak from 8:00 P.M. until midnight. At approximately midnight he left the apartment and was placed under arrest by Chicago police officers in front of the building.

No contraband was found on any of the defendants at the time of their arrest.

#### Opinion

Defendant's first contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the identification testimony was not credible. In a bench trial it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to leave a reasonable doubt of defendant's guilt will the finding of the trial court be disturbed. (People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Pointer, 6 Ill. App.3d 113, 285 N.E.2d 171.) The uncorroborated identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness credible, even though it is contradicted by defendant. People v. McVet, 7 Ill. App.3d 381, 287 N.E.2d 479.

In the case at bar the testimony of Kaner was positive and credible. He testified that during the incident he was able to get a clear look at defendant when defendant hit him in the face. Since defendant was the man who hit Kaner directly in the face,





it is likely that Kaner's attention would have focused on defendant rather than on some of the other offenders whom Kaner was unable to identify. (People v. Hill, 14 Ill. App.3d 368, 302 N.E.2d 403.) Minor discrepancies in the testimony of witnesses, such as those pointed out by defendant in the instant case, affect only the credibility of witnesses which is a matter for the trier of fact to determine. (People v. Bell, 53 Ill.2d 122, 290 N.E.2d 214; People v. McMurray, 6 Ill. App.3d 129, 285 N.E.2d 242.) After a complete review of the record before us, we conclude that the evidence presented by the State was sufficient to establish defendant's guilt beyond a reasonable doubt.

In this regard defendant also argues that his alibi testimony raises a reasonable doubt as to his guilt. A trial judge is not obliged to believe a defendant's alibi testimony. (People v. Jackson, 54 Ill.2d 143, 295 N.E.2d 462.) Here the trial judge, after seeing and hearing all of the evidence, concluded that defendant's guilt had been established beyond a reasonable doubt. Upon the record before us we cannot say that his determination was erroneous.

Defendant's second contention on appeal is that the trial court's finding of not guilty as to Moody is so irreconcilable with the finding of guilty as to himself that it raises a reasonable doubt of his guilt. In People v. Hill, 14 Ill. App.3d 368, 373, 302 N.E.2d 403, this court, in rejecting a similar contention, quoted from People v. Jones, 132 Ill. App.2d 623, 270 N.E.2d 288, where the court said:

"The rule is that where a verdict is reversed for inconsistency in such cases, the verdicts must have been based on precisely the same evidence, identical in all respects as to both defendants."

In People v. Fort, 133 Ill. App.2d 473, 273 N.E.2d 439, defendant on appeal argued that the acquittal of a co-defendant





required a reversal of the conviction. In rejecting this contention this court quoted from People v. Edwards, 81 Cal. App.2d 655, 661, where the court said:

"When there is the slightest difference in the evidence as between two persons jointly tried the trier of facts may weigh the evidence and make allowance for such difference, and when that is done and one is acquitted and the other convicted, the fact that the evidence involves the acquitted person to some extent will not require exoneration of the other."

In the case at bar the evidence was not identical as to Moody and defendant. Although both men were identified by Kaner, that is the only similarity. Kaner testified that he first observed defendant when defendant hit him in the face. Thereafter defendant hit Kaner in the face several times and punched him in the stomach. Kaner was unable to state exactly what Moody did. Kaner's testimony established that he had a greater opportunity during the incident to view defendant than Moody. Since the evidence was not identical as to Moody and defendant, the finding of not guilty as to Moody is not so irreconcilable with the finding of guilty as to defendant so as to create a reasonable doubt of defendant's guilt.

Defendant's final contention on appeal is that his sentence is in violation of the Unified Code of Corrections. Since defendant's case has not yet reached the stage of final adjudication, the Unified Code of Corrections is applicable. (People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) Defendant was placed on probation for a period of one year with the condition that he serve the first six months in the House of Correction. The Unified Code of Corrections, as originally enacted, provided that when a defendant is placed on probation, he can be committed to a period of imprisonment only under Article VII. (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-6-3(d).) Article VII of the Unified Code of Corrections



provides only for periodic imprisonment. (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-7-1.) Here the condition that the defendant spend the first six months in the House of Correction is improper and must be vacated. People v. Claudio, 13 Ill. App. 3d 537, 300 N.E.2d 791.

We are aware, as the State has argued, that the Unified Code of Corrections has been amended by Public Act 78-939 to provide that a defendant may be imprisoned as a condition of probation for a period up to six months. However, since that act does not provide an effective date, it would not be effective until July 1, 1974 (1970 Illinois Constitution, Article IV, Section 10). (People ex rel. Klinger v. Howlett, 50 Ill.2d 242, 278 N.E.2d 84.) We must apply the law that is in effect at this time.

Defendant's sentence is modified by eliminating the condition that he serve the first six months in the House of Correction, and the judgment is affirmed.

JUDGMENT AFFIRMED, SENTENCE MODIFIED.

Abstract Only.



No. 57979

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Plaintiff-Appellant, )  
 )  
 v. )  
 )  
 RONALD HELTON, )  
 )  
 Defendant-Appellee. )

APPEAL FROM THE  
 CIRCUIT COURT OF  
 COOK COUNTY

HONORABLE  
 DANIEL J. RYAN  
 PRESIDING.



PER CURIAM\* (First District, Fifth Division):

This is an interlocutory appeal by the People of the State of Illinois from an order granting a motion to suppress statements and a motion to quash an arrest warrant.

The facts as adduced at the hearing on the motion to suppress and the motion to quash are summarized. On December 26, 1969, Lieutenant George Ekblad, Detective Ronald Van Raalte and Detective Gene Deck of the Arlington Heights Police Department, pursuant to the investigation of a murder which had occurred in Arlington Heights, went to the Du Page County Sheriff's office to interview defendant who was in custody there for other charges. Defendant was given his constitutional Miranda warnings and a written statement was taken. Later that afternoon, an oral statement, recorded on closed circuit, video taped T.V., was also taken.

On December 27, 1969, Lieutenant Ekblad, Detective Van Raalte and Detective Deck returned to the Du Page County Sheriff's office to interview defendant. Defendant was again given his constitutional Miranda warnings and a second written statement was taken. Thereafter, a second oral statement, transcribed on closed circuit, video taped T.V., was also taken.

On December 29, 1969, Lieutenant Ekblad presented a complaint and an arrest warrant for defendant to Judge Paul O'Malley in the Arlington Heights Police Station courtroom. Lieutenant Ekblad was sworn to testify and was asked certain questions pertaining to the case by Judge O'Malley. Judge O'Malley thereafter signed a warrant for the

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\*Mr. JUSTICE BARRETT did not participate.





defendant's arrest. The warrant was served on Du Page County authorities and on December 31, 1969, they delivered defendant to the Arlington Heights Police Station.

On December 31, 1969, defendant was arraigned before Judge Paul O'Malley at the Arlington Heights Police Station courtroom. At his arraignment, defendant was given his constitutional Miranda warnings and the cause was continued until January 9, 1970, for the appointment of the public defender. There was no public defender in the courtroom on December 31, 1969.

On December 31, 1969, assistant State's attorney Joseph Poduska, interviewed defendant at the Arlington Heights Police Station. Defendant was given his constitutional Miranda warnings and was asked if he wished to make a statement. Defendant replied that he did. A court reporter was summoned and a written statement was then taken from defendant. The statement was also transcribed on closed circuit, video taped T.V.

From December 31, 1969, until April 14, 1970, defendant was held in the Arlington Heights Police Station. During this time, he was given a free run of the jail and was paid for various duties he performed within the jail. Defendant testified that during this period he was constantly asked questions about his statements by Detective Deck. This was, however, denied by Detective Deck.

Detective Deck testified that on April 14, 1970, defendant came into his office and asked to talk to him. Defendant began to cry and at that time made an oral statement.

On April 15, 1970, defendant was taken to the State's attorney's office at 26th and California where he was interviewed by assistant State's attorney Matthew Walsh. After being advised of his constitutional Miranda rights, defendant made an oral statement. Defendant then conferred with the assistant public defender and with his mother by telephone. A court reporter was brought into the room and the taking of a written statement was then commenced. Defendant indicated that he did not at that time wish to make a statement and no subsequent questions were asked.



After a hearing on the motions was completed, the trial judge ruled that the statements taken from defendant on December 26 and 27, 1969, could be admitted into evidence. The trial judge also ruled that the incarceration of the defendant for 106 days in the Arlington Heights Police Station constituted implied mental coercion and he suppressed all statements taken from defendant on April 14 and 15, 1970. The trial judge stated that it was not clear whether defendant's statement given to assistant State's attorney Poduska on December 31, 1969, was given before or after defendant was arraigned and it was also suppressed.

On the motion to quash the arrest warrant and complaint, the trial judge ruled that, since the arrest warrant and complaint signed by Lieutenant Ekblad did not, within its four corners, state how Lieutenant Ekblad had received his information, probable cause was not established. The trial judge refused to consider the oral testimony given by Lieutenant Ekblad at the time the warrant was issued.

#### OPINION

The State's first contention is that the trial court erred when it suppressed the written statement given to assistant State's attorney Joseph Poduska on December 31, 1969, at the Arlington Heights Police Station. The State does not challenge the judge's ruling suppressing all oral and written statements given thereafter.

In the case at bar, defendant was informed of his constitutional Miranda warnings on December 26 and 27, 1969, when he was interviewed at the Du Page County Jail by Arlington Heights police officers. Defendant was transported to the Arlington Heights Police Station on December 31, 1969, at which time he was interviewed by assistant State's attorney Joseph Poduska and a written statement was taken. The beginning of that written statement shows that Mr. Poduska gave the defendant the following warnings:

"MR. PODUSKA (assistant State's attorney):  
Q. ... Now, I want you to be well aware of the fact that you have a right to remain silent at this time; that anything you say from here on out may be used against you in any court of law and will, more than likely, be used against you. You have a right to talk to a lawyer and have that lawyer be present with you at this time. If you do not have a lawyer, we will



"be able to get a lawyer for you and make sure he is present while any questions are being asked of you. If you can't afford a lawyer, the Court will appoint a lawyer to represent you and you need not make any statements until that lawyer is present. You understand the admonishments I just gave you, your right to a lawyer and your right to remain silent, the fact that anything you tell us right now may be used against you?

A. Yes, sir.

Q. Now, having all these rights in mind, do you wish to talk to us now?

A. Yes, sir.

LIEUTENANT EKBLAD: Talk louder.

MR. PODUSKA: Q. Do you wish to make any statement relative to this murder at this time?

A. Will you repeat that, please?

Q. Do you wish to make any statement relative to this murder at this time?

A. Yes.

LIEUTENANT EKBLAD: You have to speak louder.

MR. PODUSKA: Q. Knowing full well that any statement that you make at this time will be used against you, you still wish to make statements?

A. Yes, sir.

Q. You also understand that you have a right to have your parents here or any of your relatives, close relatives here if you want them?

A. Yes, sir.

Q. And you realize you have no relatives here at this time?

A. Right.

Q. And you still wish to make some statements to me and to the officer?

A. Yes, sir.

Q. Are you willing to make these statements of your own free will without any fear or threats or promises or reward or inducement on my part?

A. Yes, sir.

Q. You realize I cannot make any deal with you at this time regarding any statements that you may make and any help that you may give Lieutenant Ekblad or any other policeman or the State's Attorney's office? I can't guarantee you anything. You understand that?

A. Yes, sir.





Q. You still wish to make statements?

A. Yes, sir."

Miranda does not require a ritualistic use of words but rather an intelligent conveying to the individual involved of his rights set forth in that decision. (People v. Prim, 53 Ill. 2d 62, 289 N.E.2d 601.) After a review of the above quoted warnings, we find that they were sufficient to substantially comply with Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602.) Once an accused has been advised of his rights and indicates that he understands them, his choosing to speak and not to request a lawyer is evidence that he knows his rights and chooses not to exercise them. People v. Burbank, 53 Ill. 2d 261, 291 N.E.2d 161; People v. Brooks, 51 Ill. 2d 156, 281 N.E. 2d 326.

In his findings of fact, the trial judge found that it was uncertain whether the written statement given to assistant State's attorney Joseph Poduska was given before or after defendant was arraigned. At defendant's arraignment, he was told that he had the right to counsel and the case was continued until January 9, 1970, for the public defender to appear and represent him. Even if defendant's statement was given after his arraignment, it would still be admissible at trial. In his written statement given to Poduska, defendant was specifically informed that he had the right to counsel, and if he could not afford counsel one would be appointed for him free before any questions were asked of him, and he need not make any statement until his attorney was present. Defendant did not at any time indicate that he wished to have counsel present and stated that he voluntarily wanted to give a statement. (People v. Green, 9 Ill. App. 3d 280, 292 N.E.2d 65.) After a complete review of all of the testimony adduced at the hearing and the motion to suppress, we conclude that defendant, when brought to the Arlington Heights Police Station on December 31, 1969, was properly informed of his constitutional rights pursuant to Miranda and voluntarily chose to waive those rights and give a voluntary statement to assistant State's





attorney Poduska. The trial judge's order suppressing that statement must therefore be reversed.

The State's second contention is that the trial court improperly granted defendant's motion to quash the arrest warrant. The trial judge granted defendant's motion to quash the arrest warrant on the basis that the complaint for a warrant was signed by Lieutenant Ekblad but the warrant did not state how Lieutenant Ekblad acquired his knowledge. The trial judge ruled that he could not go beyond the four corners of the warrant and refused to consider what Lieutenant Ekblad had testified to under oath before the issuing judge.

In People v. Waitts, 36 Ill. 2d 467, 224 N.E.2d 257, the defendant appealed from his conviction for possession of a narcotic drug. On appeal, defendant argued that the complaint which was the basis for the arrest warrant did not meet Federal and State constitutional standards upon which the issuing magistrate could find probable cause. The statute in effect governing arrest warrants at that time stated that the complainant had "just and reasonable grounds" to believe that the alleged offender had committed the offense. (Ill. Rev. Stat. 1961, ch. 38, par. 663.) The facts adduced at the hearing in Waitts demonstrated that the complaint for the arrest warrant merely stated that the defendant had committed the offense of sale of a narcotic drug and set forth the elements thereof. A second paragraph stated that the affiant had "just and reasonable grounds" to believe the defendant had committed the offense. Based solely upon that complaint, an arrest warrant was issued. On appeal, the Supreme Court reversed the defendant's conviction upon the fact that the complaint in question contained nothing more than a police officer's statement that he had just and reasonable grounds to believe that the defendant had committed the offense. There were no facts or underlying circumstances from which the issuing magistrate could possibly find probable cause. The court stated:

"Although the complainant may have had 'just and reasonable grounds', these grounds must be made clear to the magistrate."



The court went on to hold that since the grounds for probable cause were not made clear to the issuing magistrate, no probable cause was shown and the arrest warrant, therefore, was invalid.

Section 107-9 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 107-9.), which was in effect at the time the arrest warrant here was issued, details what must be in a complaint to justify the issuance of the arrest warrant. That section states:

"(b) The complaint shall be in writing and shall:

- (1) State the name of the accused if known, and if not known the accused may be designated by any name or description by which he can be identified with reasonable certainty;
- (2) State the offense with which the accused is charged;
- (3) State the time and place of the offense as definitely as can be done by the complainant; and
- (4) Be subscribed and sworn to by the complainant."

Subsection (c) of the statute also sets forth when an arrest warrant shall be issued:

"(c) A warrant shall be issued by the court for the arrest of the person complained against if it appears from the contents of the complaint and the examination of the complainant or other witnesses, if any, that the person against whom the complaint was made has committed an offense."

The statute in effect at the time the arrest warrant was issued in the case at bar did not require that the complaint for the arrest warrant allege how the affiant obtained his information. It specifically provided for an interrogation of the complainant by the judge who issued the arrest warrant to determine probable cause. Unlike Waitts, the arrest warrant in the case at bar was not issued solely based upon the complaint, but was based upon the complaint and an examination of the complainant under oath pursuant to the statutory provisions in effect at the time of the issuance of the arrest warrant. Where a motion to quash an arrest warrant is filed, the judge hearing that motion must have before him the same knowledge the judge who issued the arrest warrant had in order to make a proper and intelligent judgment as to whether or not probable cause existed. To this end, the trial judge



must look at the same things the judge who issued the arrest warrant looked at, i.e., both the complaint and the oral testimony heard under oath at that time. When the trial judge in the case at bar ruled that he could not go beyond the four corners of the warrant, he was in error.

We, therefore, reverse and remand for a new hearing, instructing the trial judge to consider both the complaint and the testimony which the judge who issued the arrest warrant heard.

The order of the circuit court granting defendant's motion to suppress statements and his motion to quash the arrest warrant is reversed and the cause remanded for further proceedings.

Order reversed,  
Cause remanded.

[PUBLISH ABSTRACT ONLY.]







NO. 59048

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
	)	
v.	)	
	)	
JESSE WEST,	)	HONORABLE
	)	JAMES M. BAILEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM<sup>\*</sup> (First District, Fifth Division):

Following a bench trial, defendant was convicted of armed robbery pursuant to section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-2.) and, after a hearing in aggravation and mitigation, sentenced to a term of 4 to 12 years. On appeal, he contends that: (1) it was error to permit the use of his oral statement to a policeman for impeachment purposes, (2) he was denied due process of law by the incompetency of his counsel, and (3) the sentence is excessive.

The following evidence was adduced.

Oscar Frenny, a witness for the State, testified. He was in a card game with 15 to 17 other persons including Isiah Clayton, Louis and Raymond Smith, in the early morning hours of December 18, 1971; the game was being played in a third floor apartment at 526 E. 43rd Street. Defendant, Eskar Crosby, and a third small sized man wearing a pig-tailed hair style in braids, came in. He got up from the table but Crosby, taking a sawed-off shotgun from his coat, ordered him to sit down. Defendant took the gun and at the same time directed Crosby to go around and search their pockets. Everybody was ordered to put their money on the table. The small sized man had two pocket knives which he stuck in the witness's back as he searched him. It was bright in the room. Defendant ordered everybody to "hit the floor." A shot was fired into the ceiling and defendant grabbed some of the money from the table and ran out of the apartment with Crosby. The witness followed and found the police had defendant and Crosby against the wall. He told the police

<sup>\*</sup> Mr. JUSTICE BARRETT did not participate.



that they had the stick-up men. Defendant was wearing a black fuzzy bear-like fur coat and Crosby a short suede jacket. He identified defendant at a police line-up. Prior to the robbery, he had never seen either of them before.

Wayne Raschke, a Chicago police officer, testified for the State. He and his partner Robert Fitzgibbons were cruising the area when they received a citizen complaint. Fitzgibbons went to the front of 526 E. 43rd Street while he went to the rear. He saw defendant in a three-quarter length fur coat, carrying a sawed-off shotgun. Lighting conditions were good. He ordered defendant to drop the weapon. When the weapon was pointed at him, he fired his service gun four times above the door. Defendant dropped the shotgun and closed the door. The witness recovered the weapon from the porch. It was loaded but had jammed. He went through the apartment and out to the front where Fitzgibbons and two other police officers had defendant and Crosby in handcuffs. Defendant had a black three-quarter length coat on. He was unable to apprehend the three persons he observed jumping from a window onto the roof next door.

Robert Fitzgibbons, a Chicago police officer, testified for the State. He arrested defendant and Crosby as they came out of the building. He told Frenny to get up against the wall, but Frenny said the other two were the stick-up men. He took \$131 in folded money from defendant after searching him.

Andrew Thomas, Jr., testified for the defense. He lives in the building where the gambling was going on. He denied Crosby was present. There were five robbers in all. The "little bitty short one" put our money in his pocket. He did not see defendant in the room nor did he see him with a gun nor take the money. He was looking out the window when Crosby was arrested.

Defendant testified on his own behalf that on the day in question, he was working at Gale Provision Company until 6:00 p.m. He went home. Later at 9:30 or 10:00 he shot crap and had about \$120 in his pockets. He went to the "500 Club" and left to look for "Bob" at the place where



the robbery took place. He was on his way upstairs when a tall man dressed in a long gray or blue overcoat passed him going down. He heard shots, glass breaking and fighting and turned around to go down. The officer stopped him when he came out of the building and searched him. The money taken by the police was all his money. He admitted he wore a blue shirt, blue knit pants and a black fur coat. He denied telling the police after the line-up that he had committed the robbery.

Robert Utter, a Chicago police officer, testified for the State on rebuttal that he advised defendant of his constitutional rights before the line-up. After the line-up, he told defendant he had been identified during the line-up by six people. He further testified that defendant stated: "You know I was there. You know I was the guy. You know the other guy was there. But don't ask me about nobody else. I'm not going to put anybody else in the bag." Defendant, recalled in rebuttal, denied making the statement.

Eskar Crosby was found not guilty. After finding defendant guilty and holding a hearing in aggravation and mitigation the court sentenced him to 4 to 12 years, stating that defendant had deliberately lied and that he was proven guilty beyond a reasonable doubt.

#### OPINION

Defendant argues it was error for the trial court to admit hearsay testimony by Police Officer Utter concerning his identification and that this testimony was the only evidence presented that five other persons, whom the State did not produce at trial, had identified the defendant. The State argues the testimony was proper because it was not used to corroborate the identification of defendant, but rather to impeach defendant and show the circumstances in which his prior inconsistent statement was made. The record discloses that on cross-examination defendant denied he had told Police Officer Utter that he committed the robbery. The State called Utter on rebuttal, who stated that he told defendant that six people had identified him in the line-up and that defendant then stated, "You know I was there. You know I was the guy."

Utter's testimony showing the circumstances surrounding the





making of the prior inconsistent statement by defendant, was for the sole purpose of impeaching defendant's testimony and not as evidence of identification. The law is clear that the testimony of Utter could be used for impeachment after defendant had taken the witness stand and testified contrary to his previous statement. Harris v. New York, 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643; People v. Denham, 41 Ill.2d 1, 241 N.E.2d 415; People v. Burbank, 53 Ill. 2d 261, 291 N.E.2d 161; People v. Moore, 54 Ill. 2d 33, 294 N.E.2d 297.

Defendant relies upon People v. Reeves, 360 Ill. 55, 195 N.E. 443, and People v. Wright, 65 Ill. App. 2d 23, 212 N.E.2d 126. Reeves and Wright are not applicable because they involved testimony used during the case in chief to bolster the identification of defendant as the guilty party. Here the testimony of Utter was not used for corroboration of the identification of defendant, but rather to impeach defendant and show the circumstances in which his prior inconsistent statement was made. In Harris v. New York the United States Supreme Court said:

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See United States v. Knox, 396 U.S. 77 (1969); cf. Dennis v. United States, 384 U.S. 855 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment."

Defendant also argues that it was error for Utter to testify that he told defendant five other persons had identified him because such testimony was hearsay, since the State did not produce those individuals at the trial. We have heretofore found that Utter's testimony was admitted only for the purpose of impeaching a prior inconsistent statement by defendant and not for the purposes of identification. In a bench trial, there is a presumption that the trial judge considers only competent evidence in reaching its decision. (People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 236.) This presumption can be rebutted only by actual statements of the trial judge. (People v. Burress, 3 Ill. App. 3d 408,





279 N.E.2d 523.) In the case at bar the trial court stated that defendant "deliberately continued to lie" and that the State "proved its case against him beyond any reasonable doubt." The trial court did not comment on Utter's testimony concerning the identification of defendant by six persons. Absent such a showing, a presumption that the judge considered only competent evidence in reaching his finding of guilt remains. It is apparent that the trial court considered Utter's testimony for the purpose of impeachment and not for identification. This was not reversible error.

Defendant also contends that the withdrawal by defense counsel of defendant's motion to suppress his oral statement of guilt was incompetency of counsel and violated due process of law. The record discloses that defendant filed a motion to suppress the statement made to Utter but his counsel withdrew the motion after the Assistant State's Attorney said the statement would not be introduced by the State in its case in chief, but only if the defendant submitted himself to cross-examination. In order for this court to hold that defendant was denied effective assistance of counsel it must be shown that the representation by defense counsel was of such low caliber as to reduce the proceedings to a farce.

(People v. Travis, 10 Ill. App. 3d 714, 295 N.E.2d 325.) Defendant must establish that the representation resulted in a substantial prejudice to him. (People v. Georger, 52 Ill. 2d 403, 288 N.E.2d 416.) While an attorney should be an advocate for his client, he is not obligated to urge frivolous points which are contrary to the law and the facts. People v. Stovall, 47 Ill. 2d 42, 264 N.E.2d 174; People v. Anthony, 5 Ill. App. 3d 722, 284 N.E.2d 46.

Defendant limits his criticism of defense counsel to the supposition that a "significant possibility exists that a hearing on a motion to suppress would have demonstrated that the defendant's statement was involuntary." There is no positive evidence in the record to sustain that possibility. Defendant's supposition is pure conjecture. To prove a violation of his constitutional rights defendant must establish that he suffered a substantial prejudice from the manner in which his counsel



conducted his defense. A claim of prejudice cannot be based on mere conjecture. (People v. Thomas, 51 Ill. 2d 39, 44, 280 N.E.2d 433.) Defendant has failed to prove that his counsel was incompetent in his conduct of the trial or that as a result of counsel's failure to pursue the motion to suppress he suffered substantial prejudice.

Finally, defendant argues that it was error for the trial court to impose a twelve year maximum sentence for a Class 1 felony; that the court was under an erroneous impression the maximum sentence must be three times the minimum sentence; and that since the minimum sentence for a Class 1 felony is 4 years there must be a "one-third spread" between the maximum and the minimum sentence and, therefore, the trial court imposed a sentence of "four to twelve" years. Section 5-8-1(b)(2) of the Unified Code of Corrections (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(b)(2).) provides that "for a Class 1 felony, the maximum term shall be any term in excess of 4 years." Section 5-8-1(c)(2) provides that "for a Class 1 felony, the minimum term shall be 4 years." There is nothing in the Code that there must be "a one-third spread" between a maximum and a minimum sentence for a Class 1 felony, although this one-third spread is provided for in section 5-8-1(c)(3), for a Class 2 felony, and in section 5-8-1(c)(4) for a Class 3 felony.

In the case at bar, sentencing followed a hearing in aggravation and mitigation. In aggravation the State relied on the facts of the case and the pre-sentence investigation report. In mitigation defendant's employer testified that he was a good, responsible employee who worked six days a week and earned about \$120 and that he could have his job back. Defense counsel stated that defendant's prior record consisted only of misdemeanors and that his family has always shown an interest in his welfare.

In passing sentence the trial court said that under the new act he could not consider probation because the minimum is "four years and a one-third spread, so it is four to twelve."

It has been held that the purposes of sentencing are to provide



adequate punishment for the offense, safeguard society from further offenses, and to rehabilitate the offender into a useful member of society; that the adequacy of punishment should determine the minimum sentence and the length of time needed to achieve rehabilitation should determine the maximum; and that among the factors which should be considered in reviewing a sentence are the family relationships of defendant, past employment, likelihood of rehabilitation, and defendant's conduct during incarceration before sentencing. (People v. Odom, 8 Ill. App. 3d 227, 289 N.E.2d 663.) Here defendant had "been in jail almost a year" awaiting trial.

Considering the foregoing factors in light of the facts in the record, it would appear advisable and we believe the ends of justice would be best served if the maximum sentence be vacated and the cause remanded to the trial court to impose a maximum sentence in accordance with the equities appearing in the record and the provisions of section 5-8-1 of the Unified Code of Corrections, as they pertain to a Class 1 felony.

The judgment for armed robbery is affirmed, and the cause is remanded to the trial court for the imposition of a maximum sentence in accordance with the provisions of section 5-8-1 of the Unified Code of Corrections as they pertain to a Class 1 felony.

Judgment affirmed,  
Cause remanded.

[PUBLISH ABSTRACT ONLY.]







58553

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
FRANK SHIELDS,	)	HONORABLE
	)	GEORGE E. DOLEZAL,
Defendant-Appellant.)	)	PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Defendant was indicted for the murder of James McKinney. After a bench trial, he was found guilty of voluntary manslaughter\* (Ill. Rev. Stat. 1969, ch. 38, par. 9-2) and was sentenced to one to ten years. Defendant contends the evidence was insufficient to prove him guilty of voluntary manslaughter beyond a reasonable doubt and conversely that it proves he acted in necessary self-defense.

On March 8, 1969, at approximately 11:00 P.M., defendant stabbed the deceased in the New Penny Lounge located at 311 East 51st Street. Bert Lindsey, the State's sole occurrence witness and an employee of the tavern, testified for the State: He was working in the tavern from 10:00 A.M. to 8:00 P.M., had gone home for a short time and returned to the tavern sometime before 9:00

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\* Ill. Rev. Stat. 1969, ch. 38, par. 9-2:

" § 9-2. VOLUNTARY MANSLAUGHTER.] (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

- (1) The individual killed, or
- (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

"Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable."



P.M. He first saw the deceased around 5:30 P.M. when he was repaid \$2 which the deceased owed him. When he came back to the tavern after going home, the deceased was sitting about three or four feet from the back of the bar and in the same place as he had been at 5:30. The deceased had started drinking around 5:30. At about 11:00 P.M., while standing in the middle of the tavern, he saw defendant come in and walk past him toward the back of the tavern and the washrooms. As defendant walked by him, he saw a knife cupped in defendant's right hand. At this time there were 50 or 60 people in the tavern, with about 15 or 20 people located in the back. Some four or five minutes later a couple of women told him that defendant and deceased were getting into a fight. They were standing close together at the end of the bar. He saw defendant stab deceased three times. Deceased had nothing in his hands when he saw this occur. As deceased dropped to the floor, defendant started out of the tavern. He walked toward the back of the tavern, and when he observed the critical condition of deceased, he and another employee followed defendant out of the bar.

Lindsey followed defendant about one-half block from the tavern proceeding toward the 51st Street elevated train station. Defendant stopped when he called to him, "You get yourself in more trouble by running." Defendant still had the knife when the police arrested him, and he saw him hand the knife to the police officer. It was brought out that he had known deceased approximately ten years and they were friends. He never saw what occurred prior to the stabbing, nor did he overhear any conversations between the deceased and defendant. He also never saw defendant have anything to drink.

Officer Michael Caccitolo testified as a witness for the State that he saw a group of individuals following defendant.



He, along with his partner, stopped defendant, and his partner removed a knife from his hands, the knife being closed at this time. He then conducted a search in the vicinity of the victim but found no weapons. When he first stopped him, he observed that defendant was intoxicated. He formed this opinion within ten seconds of seeing defendant. Defendant was wearing a white trench coat with red stains on it. The coat was not in a dirty or wrinkled condition. He observed no physical injuries to his person, nor did defendant complain of any. At the emergency room of the hospital where the deceased was taken, he had a conference with defendant. No one else was present. After apprising defendant of his rights and telling him what he was going to be charged with, he asked, "what did you stab him for?" Defendant replied, "He spilt my drink." He did not put this statement in his arrest report. It was brought out on cross-examination that the report recites defendant said, "He struck me in the face while I had my glasses on." Officer Caccitolo denied ever being told this and said the arrest report was made out jointly with Officer Carter. At the time of the arrest, defendant did not have glasses on. The first time he saw the glasses they were in defendant's possession at the hospital and they were not in a damaged condition.

Detective Robert Mason testified as a witness for the State that at about 1:30 in the morning of the 9th of March he interrogated defendant at the police station after advising him of his rights. Defendant told him he was in the tavern and had an altercation with the deceased. He could not remember what the altercation was about. He said the deceased struck him in the face and knocked him to the floor. He found a knife which was closed. He opened the knife, got up and struck the deceased with the knife. Mason observed that defendant had a strong odor of alcohol on his breath but could not say if he was intoxicated. He saw defendant's eyeglasses and they





looked in good condition. He did not see any injuries on defendant's body, nor did defendant complain of any injuries. Defendant's clothing seemed relatively neat and they weren't torn. He specifically asked him if he was injured, and defendant said he was not. He did not put this in his report.

It was stipulated that if Dr. Jerry Kearns, the Coroner's physician, were called to testify in this matter, he would testify in accordance with the pathological report which was received in evidence. The Pathological Report and Protocol indicate that the deceased received four stab wounds. The fatal wound, on the right side of the chest, was ten centimeters long. A second wound on the left side of the chest was five centimeters long. The third wound on the left arm was seven centimeters long. The fourth wound was one centimeter in length and was on the left back shoulder. The deceased weighed 248 pounds and was six feet tall. The deceased had been drinking prior to his death.

Several persons appeared as witnesses for defendant and testified as to his good reputation in the community. Included among these people were his foreman and a neighbor. Defendant took the stand in his own behalf: He had one can of beer that evening at about 5:00 P.M. He missed his train to go home and knowing he had some time to wait for the next train, started looking for a washroom. He went into the tavern and walked to the back. He had never been in the tavern before.

When defendant exited from the washroom, about four minutes later, a man sitting on a stool had his feet blocking his path. Defendant, wanting to get by, said, "pardon me." He then said, "would you excuse me," and made a motion. When the man didn't move, he stepped over his legs. The man then jumped up and cursed at him. He looked around the room for a way to leave, but at this moment the man hit him on the side of the face, and his





glasses flew off. He had never seen the deceased before. He could not run because people were all around him. He could not see very well because his glasses were on the floor. The deceased was a very large man, much larger than himself. The deceased had hold of him and was hitting him under his chin with his knee and struck him at least three or four times. His knife was in his coat pocket. While the deceased was still beating him, he opened his knife and struck the deceased. He was frightened during the entire episode and so didn't know exactly how many times he struck the deceased.

Since he never had anything to drink at the tavern, the deceased could not have spilled a drink of his. He never told Officer Mason that he found the knife on the floor. The knife belonged to him and was used in his work. He did not know where he was stabbing the deceased for he was just trying to get away. When he saw the police after leaving the tavern, he closed the knife and gave it to the police officer. He was dizzy but was not drunk. He did not have the knife cupped in his hand when he entered the tavern.

When he left the tavern, he didn't have his glasses. A black police officer later returned his glasses. When he got the glasses, they were damaged at the top corner. The deceased did injure him, but he didn't complain to anybody. He had headaches, was dizzy, his tongue was bit up, and his jaw was beat up. Defendant did not see any blood on the deceased. He walked away fast from the tavern but did not run.

#### Opinion

Defendant argues that the evidence presented on self-defense was sufficient to leave a reasonable doubt of guilt in the mind of the trier of fact. Ill. Rev. Stat. 1969, ch. 38, par. 7-1, states:



"§ 7-1. USE OF FORCE IN DEFENSE OF PERSON]. A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

The elements which must exist in order for the defense of self-defense to be proven are that: (a) force was threatened against defendant; (b) defendant was not the aggressor; (c) that danger of harm is imminent; (d) that the force threatened is unlawful; and (e) that defendant reasonably believed that a danger exists, that the use of force is necessary to avert the danger, and that the kind and amount of force which defendant used was necessary. Further, defendant could only use deadly force if he reasonably believed such force was necessary to prevent imminent death or great bodily harm to himself. (People v. Williams, 56 Ill. App.2d 159, 165, 205 N.E.2d 749.) The difference between a justified killing under self-defense and one not justified, amounting to voluntary manslaughter, is that in the former instance the belief that the use of force is necessary is reasonable under the circumstances, and in the latter the belief is unreasonable. People v. Joyner, 50 Ill.2d 302, 278 N.E.2d 756.

Although self-defense is a question of fact for the trier of fact (People v. Graham, 2 Ill. App.3d 1022, 279 N.E.2d 41), the rule has long prevailed that a reviewing court must review the record, and if it is found there is insufficient credible evidence, if the evidence is improbable or unsatisfactory or not sufficient to remove all reasonable doubt of defendant's guilt and create an abiding conviction that he is guilty, the conviction will be reversed. (People v. Smith, 404 Ill. 350, 88 N.E.2d 834.) It must also be remembered that the burden of proof never shifts to the defendant, even where defendant pleads self-defense. People v. Williams.



Defendant has averred that the deceased attacked him, and in warding off this attack he was forced to stab his attacker. Out of the 50 or 60 people present in the tavern when these events took place, the State presented only one occurrence witness, the employee Lindsey. Yet Lindsey admitted that he knew nothing about the circumstances leading up to the fatal stabbing. He could not refute defendant's allegations that the deceased was the initial aggressor, nor the contention that not only was force threatened against defendant but that defendant was repeatedly assaulted by the deceased.

The State refers this court to the admissions made to the arresting police officers. Defendant's statement to Officer Mason that the deceased struck him in the face and knocked him to the floor is certainly consistent with defendant's contentions. Although Officer Caccitolo stated that defendant told him he stabbed the deceased because he spilled his drink, this did not appear in his police report. Further, both defendant and Lindsey stated that defendant was in the tavern for only a short period of time and had gone to the washroom during this period. Therefore, it is highly unlikely that defendant ever bought a drink. Although these statements may be arguably inconsistent and could reflect on defendant's credibility, the State admits in their brief that they were not offered as evidence of the actual circumstances of the stabbing.

Thus we are drawn to the question of whether defendant's beliefs that a danger existed and that the amount of force used was necessary were reasonable or not. "In determining the question of apparent necessity, we must view the situation through the eyes of the defendant." (People v. McGraw, 13 Ill.2d 249, 257, 149 N.E.2d 100.) Here the defendant was in a tavern with which he was unfamiliar and among people to whom he was a stranger. He





was being attacked by a man much larger in size and was in a situation where continuing harm was most likely. Even the trial court stated:

"[T]here is no doubt about the fact, there is no contradiction of the fact that the decedent was a brute; he was six feet tall, two hundred forty some pounds."

The defendant tried to escape, but the mass of people prevented him from leaving. Further, since defendant was in a place where he had a lawful right to be, he need not have even attempted to flee, for under Illinois law he could have stood his ground and met force with force even to the taking of the assailant's life, if necessary or apparently necessary to save his own life or prevent great bodily harm. (People v. McGraw.) Nor is it important that the deceased was unarmed. The attack upon defendant, under the circumstances here presented, could have led the defendant to reasonably believe he was in danger of great bodily harm, and such a reasonable belief is all the law requires in order to justify the killing. (People v. Motuzas, 352 Ill. 340, 185 N.E. 614.) After the stabbing, defendant walked out of the tavern and peacefully turned over his knife to the police officers.

The State finally argues that the physical evidence and circumstances of defendant's appearance support the view that self-defense was not demonstrated. There is undisputed evidence that of the four stab wounds one was in the back shoulder, another on the left arm, another on the left side of the chest and the fatal one on the right side of the chest. Defendant testified that in his endeavor to free himself from the assault by the deceased, he wildly slashed at him. The number and placement of the stab wounds are certainly consistent with this testimony. Nor can we place much emphasis on the fact that defendant's clothes were relatively neat and that no noticeable bruises appeared after the alleged struggle. Certainly under these circumstances a person



should not have to wait until he is badly beaten before he defends himself. Therefore, under the record before us, we find that the State has not met its burden of proving that defendant's belief was unreasonable or that he was not acting in self-defense.

The judgment is reversed.

REVERSED.

Sullivan, P.J., and Lorenz, J., concur.

ABSTRACT ONLY.













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